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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

AARON HENRY, et al.,
Petitioners,

versus

CLAIBORNE HARDWARE CO., et al.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No.

AARON HENRY, et al.,

Petitioners,

versus

CLAIBORNE HARDWARE CO., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CRCUIT

The petitioners, Aaron Henry, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 23, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 444 F.2d 1300 and appears in the Appendix filed with this petition. The opinion of the District Court for the Northern District of Mississippi is reported at 50 F.R.D. 251, and appears in the Appendix.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit was entered on June 23, 1971. A timely petition for rehearing *en banc* was denied on September 16, 1971, and on October 1, 1971, the mandate of the Court of Appeals was stayed by order of the Fifth Circuit for thirty days to permit petitioners to file this petition. This petition for certiorari was filed within 90 days of the denial of the petition for rehearing *en banc*. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a District Court has jurisdiction pursuant to 28 U.S.C. §§ 1343 and 1331 of a complaint filed by persons and organizations engaged in civil rights activities seeking Federal injunctive relief against pending state court civil proceedings filed by private persons pursuant to unconstitutional state statutes and brought in bad faith for purposes of harassing petitioners in the exercise of rights protected by the First and Fourteenth Amendments?

2. Whether private persons who seek to harass petitioners in the exercise of their constitutionally protected rights of expression by filing a state civil suit for damages and injunctive relief pursuant to state statutes which purport to authorize the suit and who seek to interfere with petitioners' free exercise of their rights through the machinery of the state courts are

immune from suit under 42 U.S.C. § 1983 because of the "color of law" requirement of that statute?

3. Whether the District Court was authorized, under the above circumstances, to entertain the cause of action for relief under the Constitution and laws of the United States where the complaint alleges and preliminary proof shows that the plaintiffs are threatened with irreparable injury to fundamental Federally protected constitutional rights resulting from the attachment of their funds pursuant to patently unconstitutional state prejudgment attachment proceedings and from the imminent enforcement of unconstitutional state statutes abridging free speech.

4. Whether the Court of Appeals erred in ordering that the amended complaint, which included allegations that the state statutes invoked by the state court complainants in their state civil action were unconstitutional on their face as abridging free expression and as applied for the purpose of discouraging Federally protected activities, should be dismissed altogether on abstention principles and in deference to state court proceedings.

5. Whether the District Court had jurisdiction to issue a preliminary injunction temporarily to preserve the status quo and to protect its jurisdiction pending its determination of complex questions of Federal jurisdiction and its final determination of whether a permanent injunction was authorized and required.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision thereof is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. § 1343.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege

or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioners (plaintiffs below) are the National Association for the Advancement of Colored People (NAACP) the Mississippi State Conference of the NAACP, various Mississippi NAACP branches, and individual black citizens of Mississippi, whose class representative is Aaron Henry, president of the State Conference and the Coahoma County Branch of the NAACP. For several years, individual plaintiffs sought to eliminate, by peaceful means, racial discrimination

practices by white merchants and local town officials in the Town of Port Gibson, Mississippi. The fundamental goals of this peaceful protest were to achieve fair employment practices by the merchants, to secure fair treatment of black customers through the use of courtesy titles and the like, and to eliminate racial discrimination by public officials. As part of this effort, plaintiffs concluded that economic pressure was likely to be an effective method of achieving their goals, and encouraged — by occasional picketing, leafleting, public meetings, and conversations — and participated in a selective buying campaign in early 1966 against many of the white Port Gibson merchants whom they believed were responsible for perpetuating racial discrimination. The record here shows that all these activities were generally peaceful.

On November 4, 1969 twenty-three merchants from Port Gibson, Mississippi, who were allegedly affected by the boycott (the respondents here) filed a bill of complaint in equity in Hinds County (Jackson), Mississippi, Chancery Court against the National Association for the Advancement of Colored People (NAACP), a New York corporation domiciled in Mississippi, Mississippi Action for Progress (MAP), a federally-funded anti-proverty program resident and incorporated in Mississippi, and almost 150 individual residents of Mississippi seeking inter alia, to (1) attach all the funds, property and effects of the NAACP and its branches in Mississippi, (2) enjoin the boycott, all picketing associated therewith, and all other activities in connection with the boycott, such as advising or asking persons not to shop at the boycotted stores, and (3) award

the merchants damages of over $3.5 million, jointly and severally against all the state court defendants. The suit was based on the Mississippi anti-trust statutes, Miss. Code §§ 1088, 1089, and 1092 (Recomp. 1956), the state "secondary boycott" statute, Miss. Code § 2059.3 (Supp. 1971), and general tort allegations.

Upon the filing of the bill of complaint, the Clerk of the Chancery Court for the First Judicial District of Hinds County, without any notice or hearing to the defendants in the action, summarily served writs of attachment on fifty-six banks throughout the state attaching the bank accounts not of the state court defendants, but of the Mississippi State Conference of the NAACP and all local and county branches of the NAACP in the state, under the authority of Mississippi's non-resident, absent or absconding debtor attachment statute, Miss. Code § 2730 (Recomp. 1956). The state court defendants have moved in state chancery court by general and special demurrer to have the complaint dismissed and these attachments dissolved, but the general and special demurrers were overruled on February 27, 1970, and the chancellor has to date refused to dismiss the complaint or to dissolve the attachments.

Three days after the state chancery suit was filed and the NAACP funds attached, on November 7, 1969, two NAACP organizations, the State Conference and the Coahoma County Branch, filed a class action complaint in United States District Court for the Northern District of Mississippi alleging a violation of constitu-

tional rights actionable under 42 U.S.C. § 1983 and seeking an injunction against attachment of their funds. A hearing was held on December 1, 1969, at which plaintiff Aaron Henry testified that the embargo on the funds of the NAACP State Conference and all county branches caused by the attachments had brought to a "complete halt" the efforts of the NAACP to gain equal treatment and equal justice for black people throughout the state, including voter registration, emergency welfare and relief, and school desegregation activities. Mr. Henry indicated that as a result of the filing of the state chancery suit, there had been a substantial decline in participation in picketing activities to end racial discrimination, fund-raising for NAACP activities, and NAACP membership and participation throughout the state. The pendency of damage claims in the millions of dollars had created, according to his testimony, a climate of fear and a resulting reluctance on the part of black people to join or identify with the NAACP or to participate in the exercise of First Amendment rights. A temporary restraining order and then a preliminary injunction were issued releasing the attached funds upon posting of substantial bonds.

On December 15, 1969, the same plaintiffs as representatives of the class of defendants in the state chancery suit, with added parties, filed an amended complaint to enjoin the state chancery suit on the grounds that the state chancery suit was brought in bad faith, has no basis in fact, and was filed exclusively for purposes of harassing the civil rights demon-

strators and interfering with their First Amendment rights; that the state statutes under which the suit was brought are unconstitutional and violative of express constitutional guarantees; and that the filing of the state chancery suit and attachment of funds have caused irreparable injury and violation of rights which cannot be remedied by defense to the state chancery suit. App. a6 through a31.[1] Preliminary and permanent injunctive relief against the continuation of the state chancery proceeding was sought pursuant to 42 U.S.C. §§ 1981 through 1985 with Federal jurisdiction based on 28 U.S.C. §§ 1331 and 1343. Declaratory relief also was requested pursuant to 28 U.S.C. §§ 2201 and 2202. In support of their motion for preliminary injunction, eleven of the plaintiffs filed affidavits in support of the allegations of the amended complaint testifying that the charges of the state chancery suit were untrue — thus indicating that the state chancery suit was brought in bad faith and for purposes of harassment — that the purpose of the selective buying campaign was to secure an end to racial discrimination by peaceful means, and that the effect of the pendency of the state chancery suit was to harass the persons who participated in picketing and boycott activities and to discourage them and their supporters from asserting and securing the rights of Port Gibson blacks to equal treatment.

After a hearing on the motion for preliminary injunction, the District Court held that the plaintiffs were entitled to file the amended complaint as a matter of

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[1]The abbreviation "App." refers to the Appendix filed with this petition.

right, since the defendants had not yet answered, that the court had jurisdiction of the claims presented in the amended complaint on the basis of plaintiffs' contention that the defendants were seeking to deprive plaintiffs' First Amendment rights 'by the utilization of the machinery of the state courts" (50 F.R.D. at 265, App. a60) and granted a preliminary injunction against further prosecution of the pending state suit to protect plaintiffs from further irreparable injury and to preserve the status quo pending a final determination on the merits. App. a32 through a74.

> "The recital of the issues drawn in the State Action, hereinbefore contained, indicates to the Court that plaintiffs can legitimately claim that defendants seek to infringe upon their First Amendment rights, and the prosecution of the State Action will have a chilling effect upon the exercise of those rights. This appears to be a proper case for the issuance of a preliminary injunction to hold the matters in status quo until the rights of the parties can be ascertained. Otherwise, plaintiffs will suffer irreparable injury on account of loss of First Amendment rights pending a solution of the differences between the parties." 50 F.R.D. at 268, App. a68-a69.

The District Court further noted that it had no intention of immunizing plaintiffs from accountability for any conduct not protected by the First Amendment, such as violent acts in support of a boycott, and on appeal the Fifth Circuit issued an interlocutory order

expressly limiting the scope of the preliminary injunction to provide protection to the defendants from any possible violent, threatening, menacing or insulting conduct during the pendency of the litigation.

On appeal by the defendants, who were the complainants in the state chancery suit, from the preliminary injunction against further prosecution of the state chancery suit, the Fifth Circuit vacated the preliminary injunction and ordered that the amended complaint be dismissed for lack of Federal jurisdiction on the ground that "there is no 'state action' to be found in the mere filing of a private civil tort action in state court." 444 F.2d at 1312, App. a101. App. a75 through a101.

REASONS FOR GRANTING THE WRIT

This case raises substantial and as yet unanswered questions, which need to be settled, regarding the jurisdiction of Federal courts, in appropriate cases, to entertain a cause of action for an injunction against bad faith state civil proceedings for injunctive relief and damages brought by private persons pursuant to facially unconstitutional state statutes with the purpose and effect of interfering with constitutionally protected First and Fourteenth Amendment rights to free speech and due process of law.

The decision of the Court of Appeals that there is no Federal jurisdiction to entertain this cause of action conflicts with the decision of this Court in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) and with the decisions.

of other courts of appeals in its holding that Federal jurisdiction is lacking to enjoin state proceedings which deny Federal constitutional rights of expression. The Court of Appeals decision also conflicts with the decision of this Court in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970) and other decisions in its holding that private persons who seek to deny constitutional rights in effectuation of state policy and with substantial state involvement are necessarily immune from liability under 42 U.S.C. § 1983 because of the "color of law" requirement of that statute. In certain respects the issues presented here resemble those presented in another case currently pending before the Court, *Lynch* v. *Household Finance Corp.*, No. 70-5058, prob. juris. noted, Mar. 1, 1971, 39 U.S.L.W. 3375, on appeal from a decision of a three-judge District Court reported at 318 F. Supp. 1111 (D. Conn. 1970).

I. Under The Circumstances Of This Case, Federal District Courts Should Have Jurisdiction Under The Federal Civil Rights And Federal Question Statutes, 28 U.S.C. §§ 1343 and 1331, To Entertain Actions Seeking Injunctive Relief Against Harassing And Bad Faith State Civil Suits Threatening Constitutionally Protected Expression.

In *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), and last term in the *Younger* v. *Harris* sextet, 401 U.S. 37 et seq., the Court determined that under special circumstances, persons engaged in Federally protected activities or seeking to be free of bad faith and harassing state criminal prosecutions may have resort

to the equitable jurisdiction and relief provided in Federal civil rights statutes, specifically 28 U.S.C. § 1343 and 42 U.S.C. § 1983, to secure injunctive relief against pending state criminal prosecutions. In the *Younger* decisions it was pointed out that "since all these cases involve state criminal proseeutions, we do not deal with the considerations which should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently [footnote omitted]" 401 U.S. at 55 (concurring opinion of Mr. Justice Stewart, joined by Mr. Justice Harlan). At least two members of this Court in those decisions suggested that District Courts might have greater discretion to intervene in pending state civil proceedings in which the state was not a party, than in pending state criminal prosecutions, because of the greater equitable restrictions upon restrain of criminal prosecutions, *Douglas* v. *City of Jeanette*, 319 U.S. 157, 163-64 (1943), and because the "offense of state interests is likely to be less in a civil proceeding." *Younger* v. *Harris*, 401 U.S. at 55 n. 2 (Stewart and Harlan, JJ.).

This case thus poses significant questions regarding the jurisdiction of Federal courts to deal with threats to Federally protected rights which the Court declined to resolve in the *Younger* cases last term, and which now are ripe for determination. There is no doubt, on the record here presented and on the findings of the District Court, that the petitioners (hereinafter plaintiffs) were engaged in constitutionally protected activities which come within the narrow category of preferred rights which are fundamental to the operation

of democratic processes.[2] The plaintiffs include persons who through picketing, leafleting, and public meetings in Port Gibson, Mississippi, encouraged a boycott of some of the white merchants in that community in order to achieve fair employment practices, fair treatment of black customers, and otherwise to eliminate discrimination through the use of economic pressure. They stand in the same position as the *Dombrowski* plaintiffs, seeking Federal injunctive relief against harassing, bad faith state proceedings, brought pursuant to vague and overbroad state statutes (here providing for both criminal and civil proceedings), which threaten plaintiffs' free exercise of their constitutionally protected First Amendment rights. The only difference is that here the state court proceeding sought to be enjoined is a civil proceeding brought by private parties for damages and injunctive relief, rather than a criminal prosecution.

The Court of Appeals held that because the state proceeding was a civil action filed by private parties rather than a criminal prosecution, the District Court was powerless to entertain the cause of action alleged and powerless to issue a preliminary injunction to maintain the status quo pending a final determination, despite the District Court's finding (not contested by the Court of Appeals) that the pendency of the state court proceeding has a "chilling effect" upon the exer-

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[2]The District Court held: "There is little doubt but that the right of plaintiffs to peacefully picket and boycott the businesses of defendants and urge others to do so, is a right which they can enjoy, guaranteed to them by the first amendment." 50 F.R.D. at 267. See *Amalgamated Food Employees Union, Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Shuttlesworth* v. *Birmingham*, 382 U.S. 87 (1965); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

cise of First Amendment rights and that the continuation of the state proceeding posed an imminent threat of grave irreparable injury to the free enjoyment of those rights. If the opinion of the Court of Appeals is allowed to stand, the fundamental role of the Federal District Court as a forum for the protection of federally created constitutional rights will be substantially diminished. The effect would be to shut the doors of the Federal courts to citizens seeking protection of their preemptive Federal constitutional rights from deprivation by persons who, having been precluded by the decisions of this Court from cutting off civil rights advocacy by means of criminal prosecutions, now proceed by civil suits for injunctions and damages under the guise of state laws prohibiting secondary boycotts and conspiracies to restrain trade for the sole purpose of punishing citizens for their advocacy of equal treatment for blacks and intimidating them and others from exercising Federal rights under the First Amendment to achieve the equality guaranteed by the Fourteenth Amendment and Federal civil rights statutes.

The Court of Appeals' determination of lack of Federal jurisdiction derived entirely from its construction of the two Federal civil rights jurisdictional statutes, 28 U.S.C. §§ 1343 and 1331, both of which were construed to require "state action." 444 F.2d at 1308, App. a90.

(A) 28 U.S.C. § 1343(3). This section confers original jurisdiction on District Courts to redress the deprivation "under color of any State law, statute, ordinance, regulation, custom or usage" of any right, priv-

ilege or immunity secured by the Constitution or laws of the United States "providing for equal rights of citizens or of all persons within the jurisdiction of the United States." The Court of Appeals held that jurisdiction was lacking under this section because the state, "by merely holding its courts open to litigation of complaints, does not clothe the persons who use its judicial processes with the authority of the state." 444 F.2d at 1309, App. a93.

The question here is whether this section is to be interpreted to deny Federal jurisdiction when the defendants, the state court complainants, seek to infringe upon plaintiffs' First Amendment rights "by the utilization of the machinery of the state courts" (50 F.R.D. at 265, App. a60). The Court of Appeals appears to hold that Federal jurisdiction is not established unless those seeking to deny Federally protected rights are the equivalent of state officers, "clothe[d] . . . with the authority of the state," but this interpretation conflicts with the recent decisions of this Court upholding the jurisdiction of Federal courts to provide redress when private persons seek to achieve deprivation of Federally protected rights pursuant to state laws or customs which permit or encourage the deprivation, cf. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970), with the cooperation of state officials in joint activity, *United States* v. *Price*, 383 U.S. 787 (1966); *United States* v. *Guest*, 383 U.S. 745 (1966), or through the use of state judicial machinery, *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Shelley* v. *Kramer*,

334 U.S. 1 (1948). Cf. *Edwards* v. *Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S 1016 (1969).

(B) 28 U.S.C. § 1331(a). This section confers original jurisdiction on District Courts where "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States" There is no express "color of law" requirement in this section. The amended complaint contains six distinct causes of action, each of which alleges that a state statute or procedural rule violates constitutional guarantees, and each of which requests relief from the application of such unconstitutional statutes or rules. In such circumstances, "where the complaint ... is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit." *Bell* v. *Hood*, 327 U.S. 678, 681-82 (1946). The amended complaint also properly alleges the requisite amount in controversy (App. a8). Since the defendants have not yet answered to controvert the allegations of jurisdictional amount, the plaintiffs have not yet been required to prove the allegation, *Hague* v. *CIO*, 307 U.S. 496, 507-08 (1939), although sufficient support already has been provided by the defendants' state court damage claim of over $3.5 million, the attachment of over $17,000 in plaintiffs' funds, and the inestimable value of the First Amendment rights sought to be protected, cf. *Giles* v. *Harris*, 189 U.S. 475, 485 (1903).

Thus, all the prerequisites for § 1331(a) jurisdiction are established: the jurisdictional amount is satisfied

and, because the amended complaint alleges violations of First and Fourteenth Amendment rights, the action clearly "arises under the Constitution ... of the United States." If Federal jurisdiction is present, there should be little difficulty with the question of the cause of action. Because the Court of Appeals erroneously grafted a "state action" requirement onto § 1331(a), it did not fully explore the matter of a private cause of action to remedy deprivations by private persons of constitutionally protected rights. The Court in recent decisions has "re-discovered" the protections conferred by the Reconstruction statutes, 42 U.S.C. §§ 1981, 1982, and 1985, against deprivations of Federal civil rights by private persons, e.g. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1969). The authority of what has been considered the principal decision barring a Federal cause of action under these statutes for private deprivations of First Amendment rights, *Collins* v. *Hardyman*, 341 U.S. 651 (1951) was substantially diminished in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), and there are many substantial questions relating to the implications and scope of *Griffin* which should be answered.[3]

In sum, because under the allegations of the amended complaint, defendants have denied and seek further

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[3] If an adequate statutory basis is not present for the cause of action, then this Court has the inherent power to fashion a cause of action to protect paramount constitutional rights — "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood, supra*, 327 U.S. at 684, see *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

to deny plaintiffs' Federal constitutional rights, it is essential that original District Court jurisdiction be available to redress the alleged deprivations. Unless Federal jurisdiction is found to exist, those who seek to frustrate the goals of legitimate civil rights activity will have it within their power, merely by filing unfounded state suits pursuant to unconstitutional state statutes for injunctions and astronomical damages, to destroy legitimate and peaceful efforts to achieve racial equality through advocacy of economic pressure and selective buying.

II. The Decision Below Dismissing Plaintiffs' Amended Complaint Conflicts With The Decisions Of This Court Concerning The "State Action" Requirement Of The Fourteenth Amendment And The Elements Of A Claim Under 42 U.S.C. § 1983.

42 U.S.C. § 1983 provides for equitable relief against "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." Since the Court of Appeals ordered plaintiffs' amended complaint alleging, inter alia, a cause of action under 42 U.S.C. § 1983, dismissed, the Court should examine the sufficiency of the amended complaint according to "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff

can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). If plaintiffs can prove some state of facts which show that the state chancery suit filed by the defendants meets the "color of law" requirement of 42 U.S.C. § 1983, then the amended complaint by its allegations sets forth a clear-cut case for injunctive relief under Section 1983 to protect plaintiffs' constitutional and statutory rights. *Younger* v. *Harris*, supra; *Dombrowski* v. *Pfister*, supra.

There is no doubt that § 1983 provides equitable relief against deprivation of the First and Fourteenth Amendment rights to free speech and due process asserted here. *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). Further, if the amended complaint states a cause of action under § 1983, then the District Court had jurisdiction under 28 U.S.C. § 1343. See *Monroe* v. *Pape*, 365 U.S. 167 (1961); cf. *Gomez* v. *Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969). The Court of Appeals applied an erroneous legal standard inconsistent with the decisions of this Court when it held that under the circumstances of this case, there was insufficient state action in the pending state chancery court lawsuit to make out a Federal civil rights violation.[4]

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[4]The decisions relied upon by the Court of Appeals generally involved damage claims against court officers or attorneys for injuries arising out of alleged abuses of court process. None of the thirteen decisions cited are decisions of this Court, and none involved claims that state proceedings pursuant to unconstitutional state statutes deprived persons of First Amendment rights or were efforts to punish persons for their advocacy of civil rights and equal treatment for blacks.

(a) State authorization of the state chancery suit. This Court has held that private action violates Fourteenth Amendment guarantees when it is authorized or encouraged by the state or by officers of the state, whether such encouragement comes from state statute, *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Robinson* v. *Florida*, 378 U.S. 153 (1964); *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963), or announcement of policy by state officials, *Lombard* v. *Louisiana*, 373 U.S. 267 (1963).

Here the state chancery suit, filed pursuant to state statutes authorizing civil actions for damages and injunctive relief, Miss. Code §§ 2059.3 (Supp. 1971) and 1089, 1090, and 1092 (Recomp. 1956),[5] effectuates the state policy embodied in those statutes and "becomes a manifestation of that policy and is thereby drawn within the ambit of state action." *Adickes* v. *S. H. Kress & Co.*, supra, 398 U.S. at 203 (Brennan, J.). In filing their chancery suit, defendants were "persons" literally acting "under color of" state statutes. Mississippi's "secondary boycott" statute, Miss. Code § 2059.3 (Supp. 1971), recently passed (1968) as part of a cohesive statutory scheme to destroy the increasing efficacy of the civil rights boycott as an instrument for eliminating racial discrimination, directly abridges freedom of expression by authorizing severe criminal penalties and civil liability against persons who "induce or encourage" boycotts of private businesses. See App. a1 to 2. The Mississippi anti-trust statute pro-

[5]The texts of these statutes are set out in the appendix at a1 through a5.

vides severe criminal penalties and a civil cause of action against "a combination, contract, understanding or agreement, expressed or implied, between two or more persons ... when inimical to the public welfare and the effect of which would be: (a) To restrain trade * * *" Miss. Code § 1088 (1956 Recomp.), see also, Miss. Code § 1089 (1956 Recomp.). Such vague and overly-broad standards cannot be reconciled with due process requirements, especially when, as here, an effort is being made to apply them to curtail protected First Amendment activity. See, e.g., *Baggett* v. *Bullitt*, 377 U.S. 360, 367 (1964); Cf. *Grove Press Inc.* v. *City of Philadelphia*, 418 F.2d 82, 89 (3d Cir. 1969). See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

(b) Governmental functions. This Court also has held that when the state delegates, authorizes, or acquiesces in the exercise by individuals of governmental functions, or activities functionally equivalent to those exercised by state bodies or state officials, which deny Federally protected rights, then Federal jurisdiction obtains to redress civil rights violations. *Evans* v. *Newton*, 382 U.S. 296 (1966); *Terry* v. *Adams*, 345 U.S. 461 (1953); *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

The state court complainants, defendants here, are acting as "private district attorneys" seeking relief equivalent to that obtained in a criminal prosecution — it matters little to the defendants in the state suit whether they are fined $5,000 (first offense) or $10,000 (second offense) under the anti-trust statute, Miss. Code § 1088, or subjected to damages in the amount of $3.5 million. If district courts have Federal jurisdic-

tion to enjoin pending state court criminal proceedings brought by the state to punish plaintiffs for their exercise of Federally protected rights, especially those secured by the First Amendment, then Federal jurisdiction should be equally available to enjoin pending state civil actions brought by private parties who are engaged in an equivalent function, and whose harassing suits, if successful, will have the same effect.

(c) Compulsory state civil process. It has long been established that the use by private persons of state judicial machinery to achieve constitutionally impermissible ends constitutes state action in violation of secured constitutional guarantees. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Shelley* v. *Kramer*, 334 U.S. 1 (1948). When private litigants, bent on harassing and interfering with the exercise of constitutionally protected rights, commence their action in state court to attain that end, and thus, from the initiation of the action are "supported by the full panoply of state power" (*Shelley* v. *Kramer*, supra, 334 U.S. at 19), it cannot be said that the act of initiating the litigation is free of state involvement: the complaint invokes state statutory or common law authority for the cause of action; it is filed according to state law civil procedure, and the complainants obtain compulsory process by service of the complaint and summons which provides, that if the defendants should default and not answer, the complainants may obtain default judgment and utilize the full scope of judicial and executive machinery for the execution of the judgment. The initiation of such state-authorized procedures alone, like the arrest of persons engaged in Federally

protected activity, cf. *Georgia* v. *Rachel*, 384 U.S. 780 (1966), may result in the chilling of the exercise of First Amendment freedoms.

(d) Utilization of pre-judgment attachment process. The procedure is even more chilling, and the quantum of state involvement greater, where, as here, the state court complainants, in their effort to punish plaintiffs for their exercise of Federally protected rights, summarily obtained chancery attachments under Mississippi's non-resident, absent or absconding debtor statute, Miss. Code § 2730 (Recomp. 1956), of the funds of plaintiffs many of whom were not even named as defendants in the chancery complaint, and none of whom were amenable to attachment within the terms of the statute, without any prior notice or hearing in violation of plaintiffs' rights to due process of law. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). The Court of Appeals assumed that the implementation of this attachment procedure, taken alone, was sufficient state action to establish Federal jurisdiction to enjoin the state court attachments (App. a98), cf. *Hall* v. *Garson*, 430 F.2d 430 (5th Cir. 1970), but dealt with the attachments as a separate matter, because initially contested in the original complaint, and neglected to consider the jurisdictional implications of the use of the attachment procedures as an integral part of the cause of action alleged in the amended complaint, which it was.

(e) Threatened judicial action. The action of state courts in imposing penalties or damages or in otherwise depriving parties of secured rights clearly con-

stitutes a Fourteenth Amendment violation. *New York Times* v. *Sullivan*, supra; *Shelley* v. *Kramer*, supra. Thus, in *American Federal of Labor* v. *Swing*, 312 U.S. 321 (1941), enforcement by state courts of the common-law policy of the state which resulted in the restraining of peaceful picketing was held to be state action prohibited by the Fourteenth Amendment's guarantees of free speech. If state judicial action restricting free speech denies First-Fourteenth Amendment rights, then, as this Court held in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), the threat of state judicial action inhibiting Federally-protected free speech should be equally actionable, since where First Amendment rights are concerned, "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). The District Court in this case found such a threat of irreparable injury to First Amendment rights to exist, and the Court of Appeals did not challenge its findings of fact in issuing the preliminary injunction. Under these circumstances, anticipatory Federal injunctive relief against the pending state court litigation is necessary to protect plaintiffs' Federally secured rights because "those rights will inevitably be denied by the very act of bringing the [plaintiffs] to trial in the state court." *Greenwood* v. *Peacock*, 384 U.S. 808, 828 (1966).

In sum, the decision of the Court of Appeals seems irreconcilable with the decision of this Court in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970), which again put to rest the discredited notion "that a *private* person is necessarily immune from liability under § 1983 be-

cause of the 'under color of' law requirement of the statute," 398 U.S. at 173, n. 44, and reversed a summary judgment against the plaintiff on the grounds that plaintiff had alleged elements of state involvement, overlooked by the lower courts in their decisions, which, if established, would sustain a claim for relief under Section 1983.

III. The Exercise Of Federal Jurisdiction Of The Amended Complaint Is Supported By Fundamental Equitable Considerations.

In support of its decision that there was no Federal jurisdiction of the amended complaint, the Court of Appeals also suggested that despite the finding by the District Court of irreparable injury to First Amendments rights flowing from the very pendency of the state suit, plaintiffs had remedies in the state court and that this was a case for Federal abstention. 444 F. 2d at 1310-11, App. a96-a97. This determination overlooks the sensitive nature of the rights asserted, and conflicts with the many decisions of this Court to the effect that when the challenge is to the constitutionality of the state statutes themselves and where the proceedings under the statutes threaten or deny free expression or other fundamental Federal rights, the Federal rights asserted are too precious to be lost or jeopardized pending uncertain proceedings in the state court which may or may not ultimately result in the recognition of plaintiffs' pre-emptive Federal constitutional rights. *Dombrowski* v. *Pfister*, supra; *Baggett* v. *Bullitt*, supra; *Zwickler* v. *Koota*, 389 U.S. 241 (1967). This holding also flies in the face of the decisions of a majority of

the courts of appeals which have considered the question, including the Fifth Circuit itself, which have held that where Federal rights are threatened or denied by state proceedings, civil or criminal, District Courts do have jurisdiction in actions brought pursuant to 42 U.S.C. § 1983 in appropriate cases to enjoin the pending state proceedings to protect Federal rights.[6]

This is not a case where mere defense to the state court proceeding is sufficient to protect the constitutional rights threatened and denied by the state chancery suit. First, the state court already has refused to dismiss the bill of complaint or to dissolve the unconstitutional attachment of funds. Second, plaintiffs' proof establishes that the pendency of the state proceeding alone has caused grave irreparable injury and substantially deterred the exercise of First Amend-

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[6] First Circuit: *Strasser* v. *Dooley*, 432 F.2d 567 (1970) (dictum).
Second Circuit: *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692 (1966) (action not brought under § 1983 but to protect rights secured by the Securities and Exchange Act).
Third Circuit: *Nat'l Land and Investment Co.* v. *Spector*, 428 F.2d 91 (1970); *DeVita* v. *Sills*, 422 F.2d 1172 (1970); *Grove Press* v. *City of Philadelphia*, 418 F.2d 82 (1969); *Cooper* v. *Hutchinson*, 184 F.2d 119 (1950).
Fifth Circuit: *Duncan* v. *Perez*, 445 F.2d 557 (1971); *Sheridan* v. *Garrison*, 415 F.2d 707 (1969), cert. denied, 396 U.S. 1040 (1970); *Machesky* v. *Bizzell*, 414 F.2d 283 (1969).
Sixth Circuit: *Honey* v. *Goodman*, 432 F.2d 333 (1970).
Contra circuits are:
Fourth Circuit: *Pruitt* v. *Campbell*, 429 F.2d 642 (1970); *Baines* v. *City of Danville*, 337 F.2d 579 (1964), cert. denied, 381 U.S. 939 (1965).
Seventh Circuit: *Smith* v. *Village of Lansing*, 241 F.2d 856 (1957). But see, *Landry* v. *Daley*, 288 F. Supp. 200 (N.D. Ill. 1968), appeal dismissed, 393 U.S. 220 (1968).

ment protected rights. Third, persons who have been deterred from picketing and racial protests by the state suit, and organizations whose funds have been frozen by the attachments and whose activities have been hampered by the filing of the state proceeding — including the autonomous NAACP State Conference and county branches — are not defendants in the state suit and thus are not able to assert their rights in the state forum. Thus, this is one of those special cases where defense in the state courts is a "course" which "would not afford adequate protection," *Fenner* v. *Boykin*, 271 U.S. 240, 243-44 (1926), to the Federal rights asserted.

Given the allegations of the amended complaint, and the proof already adduced, the action of the Court of Appeals in dismissing the complaint altogether should be held to be clearly erroneous. The complaint sets forth allegations which, if established, should entitle the plaintiffs to final injunctive relief. Moreover, if the Court finds on equity grounds that final injunctive relief would not be appropriate, plaintiffs should still be entitled to declaratory relief on their claims challenging the constitutionality of the statutes invoked in the state chancery suit. On this issue, the decision of the Court of Appeals that the amended complaint should be dismissed altogether conflicts with the firmly established notion that "the abstention doctrine is inappropriate for cases ... where ... statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." *Dombrowski* v. *Pfister*, supra, 380 U.S. at 489, 390; *Zwickler* v. *Koota*, supra. Since the plaintiffs

are exposed to the imminent threat of civil liability under those statutes in the state chancery suit, there is a ripe legal conflict of sufficient immediacy and reality to warrant at least the issuance of a declaratory judgment. Cf. *Golden* v. *Zwickler*, 394 U.S. 103 (1969). On this theory, that the plaintiffs were at least entitled to declaratory judgment regarding the constitutionality of these state statutes, the Court of Appeals should have remanded the case to the District Court for further proceedings, not with instructions "to dismiss the amended complaint for lack of jurisdiction." 444 F.2d at 13 , App. a101.

IV. The District Court Had Jurisdiction To Issue A Preliminary Injunction Temporarily To Preserve The Status Quo Pending Its Determination Of Whether A Permanent Injunction Was Permissible And Required.

The District Court held that the allegations of the amended complaint, and the proof presented by the plaintiffs, established "a proper case for the issuance of a preliminary injunction to hold the matters in status quo until the rights of the parties can be ascertained." 50 F.R.D. at 268, App. a69. The decisions of this Court make it clear that where jurisdictional questions are presented with regard to the rights of plaintiffs to Federal relief, District Courts "unquestionably" have inherent power "to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction" to grant the requested relief. *United States* v. *United Mine Workers*, 330 U.S.

258, 290 (1947). Cf. *United States* v. *Shipp*, 203 U.S. 563 (1906).

Under these circumstances it is desirable that upon a prima facie showing that if prosecution of the state court lawsuit is permitted "plaintiffs will suffer irreparable injury on account of loss of First Amendment rights," 50 F.R.D. at 268, App. a69 the status quo should be maintained pending a decision of whether an injunction will lie. Completion of the state court proceedings, unless temporarily restrained, will make the question moot. See Note, 50 Va. L. Rev. 1404, 1426-27 (1964). Thus, the preliminary injunction issued here comes within one of the three express exceptions to the prohibitions of 28 U.S.C. § 2283, and is expressly authorized by that section, because the preliminary injunction issued by the District Court was "necessary in aid of its jurisdiction" to prevent the Federal claim from being rendered moot. Such a preliminary injunction against pending state court proceedings which are alleged to violate Federally protected rights was held to be authorized in *Baines* v. *City of Danville*, 321 F.2d 643 (4th Cir. 1963) to prevent the controversy from becoming moot, even though the question of jurisdiction subsequently was determined adversely to those seeking Federal injunctive protection, *Baines* v. *City of Danville*, 337 F.2d 579, 593-94 (4th Cir. 1964), cert. denied, 381 U.S. 939 (1965). Cf. *United States ex rel. Weisman* v. *Brown*, 281 Fed. 657 (8th Cir. 1922).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 30 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-605

AARON HENRY, et al.,
Petitioners,

versus

CLAIBORNE HARDWARE CO., et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MISSISSIPPI STATUTES INVOLVED

§ 2059.3. Conspiracy — unlawful restraint of trade — civil liability.

If two (2) or more persons conspire to prevent another person or other persons from trading or doing business with any merchant or other business and as a result of said conspiracy said persons induce or encourage any individual or individuals to cease doing business with any merchant or other person and when such conspiracy is formed and effectuated because of a reasonable grievance of the conspirators over which the said merchant or place of business boycotted or

against which a boycott is attempted has no direct control or no legal authority to correct, or when the conspiracy results from such alleged grievance against the merchant or other person boycotted when no notice of such grievance has been given the merchant or party boycotted and no reasonable opportunity to correct such alleged grievance has been given such merchant or other person against whom the conspiracy was formed, then each of such persons shall be guilty of the crime of unlawful restraint of trade and shall be fined not more than One Thousand Dollars ($1,000.00) or imprisoned for not more than two (2) years and in addition each such person shall be liable in civil action for any damages suffered by said merchant or place of business so wrongfully boycotted and also for attorney fees incurred by said merchant or person boycotted in a civil action to recover damages.

* * * *

§ 1088. Trust and combine — defined.

A trust or combine is a combination, contract understanding or agreement, expressed or implied, between two or more persons, corporations or firms or association of persons or between any one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be:

(a) To restrain trade;

(b) To limit, increase or reduce the price of a commodity;

(c) To limit, increase or reduce the production or output of a commodity;

(d) To hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;

(e) To engross or forestall a commodity;

(f) To issue, own or hold the certificate of stock of any trust and combine within the spirit of this statute knowing it to be such at the time of the issue or the acquisition or holding such certificate; or

(g) To place the control to any extent of business or of the proceeds or earnings thereof, contrary to the spirit and meaning of this chapter, in the power of trustees, by whatever name called; or

(h) To enable or empower any other person than themselves, their proper officers, agents and employees to dictate or control the management of business, contrary to the spirit and meaning of this chapter; or

(i) To unite or pool interest in the importation, manufacture, production, transportation, or price of a commodity, contrary to the spirit and meaning of this statute.

Any corporation, domestic or foreign, or any partnership, or individual, or other association, or person whatsoever, who is now, or shall hereafter create, enter into, become a member of, or a party to any trust or combine as hereinabove defined shall be deemed and adjudged guilty of a conspiracy to defraud and shall be subject to the penalties hereinafter provided. Any person, association of persons, corporation, or corporations, domestic or foreign, who shall be a party

or belong to a trust and combine shall be guilty of crime and upon conviction thereof shall for a first offense be fined in any sum not less than one hundred dollars nor more than five thousand dollars and for a second or subsequent offense not less than two hundred dollars nor more than ten thousand dollars, and may be enjoined by a final decree of the chancery court, in a suit by the state on the relation of the attorney-general, from the further prosecution of or doing of the acts constituting the trust and combine as defined in this chapter.

* * * *

§ 1089. Additional contracts or combinations not allowed by law.

Any corporation, domestic or foreign, or individual, partnership, or association of persons whatsoever, who, with intent to accomplish the results herein prohibited or without such intent, shall accomplish such results to a degree inimical to public welfare, and shall thus:

(a) Restrain or attempt to restrain the freedom of trade or production;

(b) Or shall monopolize or attempt to monopolize the production, control or sale of any commodity, or the prosecution, management or control of any kind, class or description of business;

(c) Or shall engross or forestall or attempt to engross or forestll any commodity;

(d) Or shall destroy or attempt to destroy competi-

tion in the manufacture or sale of a commodity, by selling or offering the same for sale at a lower price at one place in the state than another or buying or offering to buy a commodity at a higher price at one place in the state than another, differences of freight and other necessary expenses of sale and delivery considered;

(e) Or shall destroy or attempt to destroy competition by rendering any service or manipulating, handling or storing any commodity for a less price in one locality than in another, the differences in the necessary expenses of carrying on the business considered, shall be deemed and held a trust and combine within the meaning and purpose of this section, and shall be liable to the pains, penalties, fines, forfeitures, judgments, and recoveries denounced against trusts and combines and shall be proceeded against in manner and form herein provided, as in case of other trusts and combines. And it shall be sufficient to make out a prima facie case of a violation of this subdivision of this section to show lower charge for the service therein mentioned in one locality than another, or to show a higher price paid for a commodity in one locality than another, differences of freight and other necessary expenses of operating business considered.

* * * *

§ 1092. Private persons and corporations may sue.

Any person, natural or artificial, injured or damaged by a trust and combine as herein defined, or by its effects direct or indirect, may recover all damages

of every kind sustained by him or it and in addition a penalty of five hundred dollars, by suit in any court of competent jurisdiction; said suit may be brought against one or more of the parties to the trust or combine and one or more of the officers and representatives of any corporation a party to the same, or one or more of either. And such penalty may be recovered in each instance of injury. All recoveries herein provided for may be used for in one suit.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

Aaron Henry, individually and on behalf of all others similarly situated; National Association for the Advancement of Colored People; Mississippi State Conference of the National Association for the Advancement of Colored People; and Coahoma County Branch of the National Association for the Advancement of Colored People, individually and on behalf of all others similarly situated,

Plaintiffs,

versus

Civil Action
No. DC69-58-S

First National Bank of Clarksdale, individually and as representative of all others similarly situated Claiborne Hardware Company; C. H. McDaniel, Jr., doing business as McDaniel Pharmacy; James E. Hudson,

George A. Hudson, and H. B. Hudson, Jr.; doing business as Hudson Bros., trading as Piggly Wiggly Store and Hudson's Gift Shop; Waddy Abraham, doing business as Jitney Jungle; Louis N. Ellis, Executor of the Will and Estate of Michael Ellis, Deceased; Joe Elis, Mrs. Ben Mullen and Miss Ella Mae Ellis, doing business as George Ellis Food Store; Louis N. Ellis, doing business as Abe's Betty Jean and Port Gibson Trading Co.; H. D. Harwell, doing business as Mack's Package Store; Norman N. Ellis and Barbara B. Ellis, doing business as Ellis Variety Store; W. H. Hay, doing business as O.K. Cleaners and Shirt Laundry; Murad Nasif and Mildred Nasif, doing business as M & M Super Store & Washateria; Port Gibson Lumber & Supply Co., Inc.; Charles R. Dobbs, doing business as Western Auto Associate Store; Kelly D. Conn, doing business as Auto-Lec Associate Store No. 225; A & P Service and Parts, Inc.; Allen Motor Co., Inc.; Donald-Segrest Ford, Inc.; Mrs. Edgar A. McCaa, doing business as Town and Country; and Mississippi Action for Progress, Inc.,

Defendants.

AMENDED COMPLAINT

Jurisdiction

1. This is an action for injunctive and declaratory relief to protect the rights, privileges and immunities of plaintiffs guaranteed by the Constitution and laws of the United States. This Court has jurisdiction of this

action under 28 U.S.C. §§ 1331, 1343, 2201 and 2202; 42 U.S.C. §§ 1981 *et seq.*; and the Constitution of the United States, including the First, Fifth, Seventh and Fourteenth Amendments thereto. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000. An actual controversy exists between the parties, as more particularly appears below.

Parties

2. Plaintiff Aaron Henry is a citizen of the United States and of the State of Mississippi. He resides in Clarksdale, Coahoma County, Mississippi. Plaintiff Henry is named as a defendant in an action known as *Claiborne Hardware Company, et al.* v *National Association for the Advancement of Colored People, et al.*, Cause No. 78353 in the Chancery Court of the First Judicial District of Hinds County, Mississippi (hereinafter sometimes referred to as the "state chancery suit"). Plaintiff Henry brings this action individually and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, the class consisting of all individuals named as defendants in the state chancery suit.

3. Plaintiff National Association for the Advancement of Colored People (hereinafter "NAACP") is a corporation organized and existing under the laws of the State of New York, and has its principal place of business in New York City, New York. Plaintiff NAACP has, however, legally qualified to do business in the State of Mississippi.

4. Plaintiff Mississippi State Conference of the National Association for the Advancement of Colored People (hereinafter "State Conference") is an unincorporated association, resident of the State of Mississippi, and having property in the State of Mississippi. The State Conference is, in essence, an association consisting of the local branches described in ¶ 5 below. The State Conference is autonomous and independent of the NAACP. The State Conference has capacity to sue in this action under Rule 17(b)(1) of the Federal Rules of Civil Procedure.

5. Plaintiff Coahoma County Branch of the National Association for the Advancement of Colored People (hereinafter "Coahoma Branch") is an unincorporated association, resident of the State of Mississippi and Coahoma County, and having property in the State of Mississippi. The Coahoma Branch is a member of the State Conference. Other than that, the Coahoma Branch is autonomous and independent of the NAACP and the State Conference. The Coahoma Branch has capacity to sue in this action under Rule 17(b)(1) of the Federal Rules of Civil Procedure. Plaintiff Coahoma Branch brings this action individually and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, the class consisting of all local NAACP branches in the State of Mississippi.

6. As to the classes named in ¶¶ 2 and 5 above, each class (a) is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to each class; (c) the claims of the representative of each class are typical of the claims

of the class; (d) the representative of each class will fairly and adequately protect the interests of the class as a whole; and (e) defendants have acted on grounds generally applicable to each class, thereby making final injunctive relief appropriate with respect to each class as a whole.

6. Defendant First National Bank of Clarksdale is, on information and belief, a national bank, resident and doing business in Clarksdale, Coahoma County, Mississippi. Said bank is a defendant in the state chancery suit. Numerous other banks in the State of Mississippi are also named as defendants in the state chancery suit. Defendant First National Bank of Clarksdale is sued individually and as representative of a class pursuant to Rule 23 of the Federal Rules of Civil Procedure, the class consisting of all of the banks named as defendants in the state chancery suit. As to this class (a) it is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the class; (c) the defenses of the representative parties are typical of the defenses of the class; (d) the defendants will fairly and adequately protect the interest of the class; (e) plaintiffs and the class represented by the Coahoma Branch have acted on grounds generally applicable to the defendant class, thereby making appropriate final injunctive relief with respect to the class as a whole; (f) the questions of law and fact common to the members of the defendant class predominate over any questions affecting only individual members; and (g) a class action is superior to other available methods for fair and efficient adjudication of the controversy.

7. Defendants Claiborne Hardware Company; Q. H. McDaniel, Jr., doing business as McDaniel Pharmacy; James E. Hudson, George A. Hudson, and H. B. Hudson, Jr., doing business as Hudson Bros., trading as Piggly Wiggly Store and Hudson's Gift Shop; Waddy Abraham, doing business as Jitney Jungle; Louis N. Ellis, Executor of the Will and Estate of Michael Ellis, Deceased; Jo Ellis, Mrs. Ben Mullen and Miss Ella-Mae Ellis, doing business as George Ellis Food Store; Louis N. Ellis, doing business as Abe's Betty Jean and Port Gibson Trading Co.; H. D. Harwell, doing business as Mack's Package Store; Norman N. Ellis and Barbara B. Ellis, doing business as Ellis Variety Store; W. H. Hay, doing business as O. K. Cleaners and Shirt Laundry; Murad Nasif and Mildred Nasif, doing business as M & M Super Store & Washateria; Port Gibson Lumber & Supply Co., Inc.; Charles R. Dobbs, doing business as Western Auto Associate Store; Kelly D. Conn, doing business as Auto-Lec Associate Store No. 225; A & P Service and Parts, Inc.; Allen Motor Co., Inc.; Donald-Segrest Ford, Inc.; and Mrs. Edgar A. McCaa, doing business as Town and Country, are, on information and belief, individuals, corporations, partnerships and other associations residing and doing business in the State of Mississippi. They are the complainants in the state chancery suit. These defendants are sometimes hereinafter referred to as the "state chancery suit complainants."

8. Defendant Mississippi Action for Progress, Inc. (hereinafter "MAP") is a federally funded anti-poverty agency. MAP was named as a defendant in the state chancery suit. On information and belief, MAP

asserts immunity and other defenses peculiar to it in the state chancery suit. Because plaintiffs believe MAP may be a necessary party to this case in view of the relief hereinafter requested in this Amended Complaint, MAP is named as a party defendant pursuant to Rule 19 of the Federal Rules of Civil Procedure.

FIRST CAUSE OF ACTION

9. Plaintiffs repeat and reallege ¶¶ 1-8 as if fully set forth herein.

10. Plaintiff Henry, many of the members of the class he represents, the NAACP, the State Conference, the Coahoma Branch and the local branches it represents have long been active in attempting to secure the equal rights of the Negro citizens of the State of Mississippi and of the United States. These plaintiffs engage in a wide variety of political, social and economic boycott of certain merchants doing business in the achievement of this goal. Because of the effectiveness of the activities of these plaintiffs, and because of the leadership they exercise, they have frequently drawn the enmity of the white community and its officials. Attempts have been made in the past to destroy the ability of these plaintiffs and others involved in like activities to function. As more particularly appears below, these plaintiffs allege that the state chancery suit is another such attempt.

11. For some time, many persons interested in securing equal and fair treatment for the Negro residents

of the Town of Port Gibson, Mississippi, and surrounding Claiborne County have participated in, publicized, advised and encouraged others to participate in an economic boycott of certain merchants doing business in Port Gibson. The aims of the boycott are to encourage the merchants to treat black patrons with the same courtesy accorded white patrons, to encourage the merchants to follow fair hiring policies, to encourage the merchants to press for equality and fairness in other aspects of life in the community, to educate and encourage black persons not to trade with merchants who do not believe in equality and fair treatment for black persons, and other lawful and just aims. To support the boycott, many persons have engaged in activities protected by the First and Fourteenth Amendments to the Constitution of the United States, such as peaceful picketing and marching, preparation and distribution of handbills, peaceful assemblies in public places to publicize the boycott, and other peaceful and lawful activity designed to support and encourage the boycott, including simple communication by word of mouth. Many members of the plaintiff class described in ¶ 2 above have at one time or another participated in some phase of activity connected with the boycott. On the other hand, many members of that class have not participated in any activities connected with the boycott. Many persons who are not members of the class described in ¶ 2 have also participated in the boycott.

12. These activities of persons supporting the boycott, including the activities of those members of the class described in ¶ 2 above who support the boycott,

are an exercise of their rights of free speech, petition and assembly protected by the First and Fourteenth Amendments to the Constitution of the United States. Said activities have been conducted peacefully and lawfully in public places without any unreasonable interference with the rights of other persons, and on private property only with the consent of the owner. None of the plaintiffs has entered into any "conspiracy" or other agreement with any of the other plaintiffs or other persons to commit any unlawful acts.

13. Despite the peaceful and lawful nature of plaintiffs' activities, the lawfulness of the goals of their protest, and the fact that plaintiffs' activities are protected by the First Amendment, on or about November 3, 1969 the state chancery suit complainants filed their suit against the NAACP, MAP, plaintiff Henry and the individuals he represents here, and the defendant banks described in ¶ 6 above. The state chancery suit sought extraordinarily broad relief which, if granted, would completely stifle the ability of the plaintiffs herein named as defendants in the state chancery suit to continue their protest through the exercise of First Amendment rights. The relief sought in the state chancery suit was, basically, as follows:

(a) That all the lands, funds, property and effects of the NAACP in the State of Mississippi deposited in the defendant banks be attached and held to await the further orders of the chancery court;

(b) That all the defendants in the state chancery suit, except for the banks, be enjoined and prohibited from, among other

things, picketing in or about the premises of the complainants in that suit, boycotting the business of those complainants, asking or demanding that others cease doing business with those complainants, and soliciting or advising any person not to trade with those complainants;

(c) That defendants in that suit, except for the banks, be ordered to pay damages in the amount of $3,542,466.04 to the complainants.

14. The institution of the state chancery suit has already caused and will in the future cause irreparable injury to plaintiffs in the exercise of their First Amendment rights and other protected rights. Because of the fear of liability for an enormous sum of money, possible attachment or garnishment of their funds, and possible subjection to an injunction, many of those members of the class described in ¶ 2 above who have not participated in the boycott or any of the associated First Amendment activities are now afraid to participate in such activities. Many of those plaintiffs whose participation has been minimal have declined to increase or even continue their participation. Many persons who are not plaintiffs herein are afraid to and have declined to participate in the boycott or other protected activities conducted by plaintiffs for fear of being subject to this or a similar lawsuit. Many persons have declined to join or support the activities of the organizational plaintiffs named in ¶¶ 3-5 above for fear that any connection with those plaintiffs might lead to liability. Further, because the state chancery

suit's allegations as to individual defendants therein appear to be based on the mere fact that some of the defendants have simply associated with others who are active in the boycott, many plaintiffs here have fear of even associating with other plaintiffs here. And, as described in ¶ 25 below, the attachments made as a result of the state chancery suit have resulted in actual, present irreparable injury to First Amendment and other rights, as well as further contributing to the chilling effect the state chancery suit has on such rights. In sum, plaintiffs, and non-plaintiffs alike, because of the state chancery suit, will tend to steer far clear of areas of protected activity such as those described in ¶¶ 10-12 above, even though such activities are of primary public importance and are protected by the First Amendment to the Constitution of the United States.

15. On information and belief, the state chancery suit was instituted in bad faith, with a purpose to discourage and prevent plaintiffs from exercising their protected rights of free speech, petition and assembly, to discourage plaintiffs from obtaining or attempting to obtain equal rights and fair treatment, and in the hope that the effect on protected rights described in ¶14 above would in fact occur. The state chancery suit is wholly without factual foundation as to its allegations of conspiracy and unlawful conduct, and was instituted without any hope of ultimate success.

16. The institution by the state chancery suit complainants of the state chancery suit constitutes state

action which seeks to deprive plaintiffs of rights protected by the First and Fourteenth Amendments to the Constitution of the United States. In addition, pursuant to the state chancery suit and at the request of defendants named in ¶ 7 above, state officers have already issued writs of attachment and other process, as more particularly appears in ¶¶ 19-30 below. The further threat of use of state power to enforce any injunction or other relief that might ultimately be granted in the state chancery suit constitutes additional state action.

17. Plaintiffs have no adequate remedy at law. There is no adequate and speedy remedy in the state courts to protect plaintiffs' First and Fourteenth Amendment rights. Further, if the chancery court issues any injunction or other relief affecting First Amendment rights, plaintiffs will be prohibited from exercising those rights pending the ultimate outcome of that suit. Any such prohibition would of course impermissibly deprive the plaintiffs of First Amendment rights and impermissibly chill the exercise of such rights.

Prayer for Relief

WHEREFORE, plaintiffs pray that this Court:

(a) issue a declaratory judgment that plaintiffs and the members of the classes described in ¶¶ 2 and 5 above have the rights, protected by the First and Fourteenth Amendments to the Constitution of the United States, to peacefully picket, march, demonstrate, distribute leaflets or otherwise publicize and protest their grievances of racial discrimination and

denial of equal rights by either the business community or officials of Port Gibson or Claiborne County, to conduct an economic boycott of merchants they believe are acting in a racially discriminatory manner, and to urge others to comply with such a boycott:

(b) issue a preliminary and then permanent injunction restraining the defendants named in ¶ 7 above from prosecuting or continuing to prosecute the state chancery suit or any other suit against plaintiffs to the extent that such a suit infringes or chills the rights described in ¶ (a) above, or infringes or chills plaintiffs' rights to engage in free speech, petition and assembly guaranteed by the First and Fourteenth Amendments;

(c) allow plaintiffs their costs herein, including rea-

(d) grant such other and further relief as may be equitable and just;

(e) retain continuing jurisdiction of this action.

SECOND CAUSE OF ACTION

18. Plaintiffs repeat and reallege ¶¶ 1-17 as if fully set forth herein.

19. Immediately upon filing of the state chancery suit, the clerk of the Chancery Court for the First Judicial District of Hinds County commenced to issue and serve writs of attachment on the defendant bank named in ¶ 6 above and the members of the class it represents, ordering said banks to hold funds of the NAACP until further notice.

20. On information and belief, said writs of attachment were purportedly issued pursuant to the provisions of sections 2729-2734 of the Mississippi Code of 1942. Those sections provide, basically, that in an action against a nonresident defendant for damages, the chancery courts shall have jurisdiction (§ 2729) and may attach the property of the nonresident defendant in the hands of a resident defendant simply by filing a complaint and serving an appropriately endorsed subpoena on the resident defendant (§ 2730). The sections further provide that land may be similarly attached (§ 2731), and that in order to free himself of the attachment, the nonresident defendant must give satisfactory security for performing the decree (§ 2733). The state chancery suit complainants alleged in the state chancery suit that the NAACP was a nonresident, so as to come within these sections.

21. The property of several of the plaintiffs deposited in the class of defendant banks described in ¶ 6 above was attached under this procedure, as more particularly appears in ¶ 29 below. As apparently contemplated by sections 2729-2734 of the Code, the plaintiffs whose property was attached were given absolutely no notice that attachment of their property would be made, had absolutely no opportunity for any hearing on the question of the validity of the attachment, no showing was made that plaintiffs were nonresidents and thus subject to attachment, no showing whatsoever of a substantial need for such attachment was made by any person, and no summons or other process was served on any plaintiff.

22. Sections 2729-2734 of the Mississippi Code of 1942 are unconstitutional, null and void on their faces because they deprive those subject to attachment thereunder of rights secured by the First and Fourteenth Amendments to the Constitution of the United States, in at least the following respects:

(a) The property of a nonresident defendant may be attached without notice to him, without any opportunity for a hearing, without any showing of substantial need for such attachment, and even without summons being served on the nonresident, all in violation of the due process clause of the Fourteenth Amendment;

(b) The nonresident defendant is treated differently from resident defendants without any showing of a substantial state interest in such different treatment, in violation of the equal protection clause of the Fourteenth Amendment;

(c) The sections permit attachment without any judicial findings of need therefor or formal action on petitions for attachment, and thus leave the question whether property should be attached wholly in the hands of private citizens, *i.e.*, the complainants in an attachment suit. The vesting of such broad power in obviously interested private hands constitutes a deprivation by the State of the due process and equal protection of law guaranteed by the Fourteenth Amendment.

(d) The sections are not narrowly drawn so as to encroach as little as possible on the rights to notice, hearing, and other due process rights

involved in attachment proceedings. Because of their overbreadth and vagueness, the statutes violate the due process clause of the Fourteenth Amendment.

(e) Because of the broad power vested in private individuals, as described in ¶ 22 (c) above, and because of the overbreadth of the statutes, as described in ¶ 22 (d) above, the attachment procedure may be and in fact has been applied in this and in other cases to deter, harass, and punish persons engaged in civil rights activities protected by the First Amendment in the State of Mississippi. Because of the attachments permitted against plaintiff and other civil rights organizations, the statutes have a chilling effect on the ability and desire of out of state civil rights organizations to engage in protected activities in the State of Mississippi, and thus the statutes violate the First and Fourteenth Amendments to the Constitution of the United States.

23. The attachments herein, based on statutes which are unconstitutional on their faces, are themselves null and void.

24. Assuming sections 2729-2734 are not unconstitutional on their faces, they have nevertheless been unconstitutionally applied in this case, since as described in ¶ 21 above the fundamental due process requirements of notice and a hearing were not complied with in this case. Accordingly the writs of attachment are null and void as unconstitutionally issued.

25. In addition to the irreparable injury to First Amendment rights described in ¶¶ 14 & 15 above caused by the institution of the state chancery suit itself, these attachments have had the obvious additional effect of wholly preventing the plaintiffs whose property has been attached from continuing their First Amendment activities in support of equal rights and fair treatment for Negroes. As an example, plaintiff Coahoma Branch had on deposit at the time the date chancery suit was filed a large sum of money designated for a voter registration drive, but the account in which that money was deposited has been attached, with the result that the voter registration drive has been destroyed, to the irreparable injury of the Coahoma Branch and those who might have registered to vote.

26. Plaintiffs have no adequate and speedy remedy in the state courts to protect their First and Fourteenth Amendment rights, for the simple reason that attachments similar to those made here have been held valid by the highest state court. It would therefore be futile for plaintiffs to pursue any state remedy to vindicate their First Amendment rights.

Prayer for Relief

WHEREFORE, plaintiffs pray that this Court:

(a) issue a declaratory judgment that sections 2729-2734 of the Mississippi Code of 1942 are unconstitutional on their faces and as applied in this case in that they deprive persons subject to attachment thereunder of the due process and equal protection of law guaranteed

by the Fourteenth Amendment to the Constitution of the United States;

(b) issue a preliminary and then a permanent injunction restraining the defendant banks named in ¶ 6 above from detaining in any way any funds whatsoever belonging to any plaintiff or member of a class represented by a plaintiff pursuant to any writs of attachment issued in connection with the state chancery suit, and restraining the defendants named in ¶ 7 above from taking any further action to cause the attachment of any funds of any plaintiff or member of a class represented by a plaintiff.

(c) grant further relief as described in ¶¶ (c)-(e) of the Prayer for Relief of the First Cause of Action.

THIRD CAUSE OF ACTION

27. Plaintiffs repeat and reallege ¶¶ 2-26 as if fully set forth herein.

28. This Court has jurisdiction of this cause because it is ancillary and pendent to the main cause of action.

29. Subsequent to the issuance of the writs of attachment, members of the plaintiff class described in ¶ 5 came to learn that the defendant banks had frozen not only the assets of the NAACP, the nonresident defendant in the state chancery suit, but the assets of members of the plaintiff class described in ¶ 5, who are wholly independent of the NAACP. Those plaintiffs are not parties in the state chancery suit, and thus not subject to the writs of attachment. Further,

the members of the plaintiff class described in ¶ 5 are residents of the State of Mississippi and thus not even subject to the provisions of sections 2729-2734 of the Mississippi Code, which apply only to nonresidents.

30. Section 2729 of the Mississippi Code of 1942 provides for attachments in chancery only in the case of nonresidents. Accordingly, the property of the resident plaintiffs has been attached in violation of section 2729 of the Mississippi Code of 1942.

Prayer for Relief

WHEREFORE, plaintiffs pray that this Court:

(a) issue a declaratory judgment that the plaintiffs and the class described in ¶ 5 above are residents of the State of Mississippi and thus not subject to the provisions of sections 2729-2734 of the Mississippi Code of 1942;

(b) issue injunctive relief as described in ¶ (b) of the Prayer for Relief of the Second Cause of Action.

(c) grant further relief as described in ¶¶ (c)-(e) of the Prayer for Relief of the First Cause of Action.

FOURTH CAUSE OF ACTION

31. Plaintiffs repeat and reallege the allegations of ¶¶ 1-17 as if fully set forth herein.

32. On information and belief, the legal theory under which the state chancery suit complainants hope to recover rests on section 2059.3 of the Mississippi

Code of 1942 (1968 Supp.). That section provides that in cases of economic boycotts, when the merchant boycotted "has no direct control or no legal authority to correct" the grievances of the boycotters, or when the merchant has been given "no notice" of the grievances of the boycotters or "no reasonable opportunity to correct such alleged grievance," then the boycotters shall be liable to the merchant in a civil action, and also that the boycotters shall be guilty of a crime punishable by up to two years imprisonment.

33. Section 2059.3 is unconstitutional on its face as violative of the rights of free speech, petition and assembly guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, in at least the following respects:

(a) the First Amendment protects the right to trade or not to trade with any person as part of a public protest, and to encourage others to trade or not to trade;

(b) the section would inhibit and have a chilling effect on the exercise of the protected rights described in ¶¶ 10-12 above, which are normally utilized in connection with boycotts;

(c) section 2059.3 is unconstitutionally overbroad and vague, in that assuming the section covers some instances of conduct which the State could properly prevent, it does not specify these instances with any precision and sweeps within its scope conduct fully protected by the First Amendment.

Prayer for Relief

WHEREFORE, plaintiffs pray that this Court:

(a) issue a declaratory judgment that section 2059.3 of the Mississippi Code of 1942 (1968 Supp.) is unconstitutional on its face as violative of the rights of free speech, petition and assembly guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

(b) issue a preliminary and then a permanent injunction restraining the defendants named in ¶ 7 above from prosecuting or continuing to prosecute the state chancery suit or any other suit against plaintiffs in which recovery is dependent on the validity of section 2059.3.

(c) grant further relief as described in ¶¶ (c)-(e) of the Prayer for Relief of the First Cause of Action.

FIFTH CAUSE OF ACTION

34. Plaintiffs repeat and reallege ¶¶ 1-17 as if fully set forth herein.

35. The state chancery suit complainants further rely as legal grounds for their suit on the prohibitions against trusts and combines contained in sections 1088 and 1089 of the Mississippi Code of 1942. Those sections prohibit certain trusts, combines, or other agreements in restraint of trade "when inimical to public welfare."

36. Sections 1088 and 1089 may not constitutionally be applied to public issue, First Amendment activity such as that engaged in by plaintiffs herein and de-

scribed in ¶¶ 10-12 above. Plaintiffs limit their attack to the claim that the standard "when inimical to public welfare" cannot be constitutionally applied in the First Amendment area, since it is vague and overbroad. First Amendment rights may be restricted only under specific, narrowly drawn statutes and regulations, and a standard of "public welfare" cannot meet this requirement. Accordingly, sections 1088 and 1089 of the Mississippi Code cannot constitutionally be applied in this case.

Prayer for Relief

WHEREFORE, plaintiffs pray that this Court:

(a) issue a declaratory judgment that sections 1088 and 1089 may not constitutionally be applied to restrain First Amendment activities such as those described in ¶¶ 10-12 of this Amended Complaint;

(b) issue a preliminary and then a permanent injunction restraining the defendants named in ¶ 7 above from prosecuting or continuing to prosecute the state chancery suit or any other suit against plaintiffs in which it is sought to restrict First Amendment rights on the basis of sections 1088 and 1089 of the Mississippi Code of 1942.

(c) grant further relief as described in ¶¶ (c)-(e) of the Prayer for Relief of the First Cause of Action.

SIXTH CAUSE OF ACTION

37. Plaintiffs repeat and reallege ¶¶ 1-17 as if fully set forth herein.

38. Although the state chancery suit involves an action for damages in an amount of more than 3.5 million dollars, plaintiffs will have no right to trial by jury in the chancery court. They may receive a jury trial only in the discretion of the chancellor, under section 1275 of the Mississippi Code of 1942 and decision allow. On the other hand, if the suit were brought in the circuit court, plaintiffs would have an absolute right to trial by jury.

39. Under Mississippi statutory and decisional law, plaintiffs' right to a trial by jury is, essentially, controlled by the manner in which the complainants frame their petition or complaint. Here, by the simple device of coupling a prayer for an injunction with a suit for an enormous amount of damages, the state chancery suit complainants have deprived plaintiffs herein of the right to trial by jury.

40. The Mississippi practice violates the Seventh and Fourteenth Amendments to the Constitution of the United States, since it permits a party to be deprived of a trial by jury at the whim of the opposing party, in violation of the due process of law guaranteed by the Fourteenth Amendment. Further, there is no rational basis or compelling state interest in providing for trial by jury in cases in the circuit courts while denying trials by jury in cases in chancery which may be in substance identical, and thus denial of a jury trial to plaintiffs here would be in violation of the equal protection of law guaranteed by the Fourteenth Amendment.

Prayer for Relief

WHEREFORE, plaintiffs pray that this Court:

(a) declare that plaintiffs are entitled to a trial by a fair and impartial jury in the event that the state chancery suit proceeds to trial, and further declare that the right to trial by jury may not be restricted simply by coupling a prayer for relief cognizable in the chancery court with an action that is in reality an action for a substantial amount of money damages traditionally triable by a jury under Mississippi law and practice.

(b) issue a preliminary and then a permanent injunction restraining the defendants named in ¶ 7 above from bringing the state chancery suit on for trial on the issue of money damages unless plaintiffs herein are accorded the right to trial by jury in such trial.

(c) grant further relief as described in ¶¶ (c)-(e) of the Prayer for Relief of the First Cause of Action.

Three-Judge Court Unnecessary

41. Plaintiffs believe that a three-judge court is not necessary to hear the constitutional questions presented by the Second and Fourth Causes of Action since plaintiffs do not seek to restrain the action of any officer of the State, as required by 28 U.S.C. § 2281.

42. Plaintiffs believe that a three-judge court is not necessary to hear the constitutional questions presented by the Fifth and Sixth Causes of Action for the reason described in ¶ 41 above and for the additional reason that those causes of action challenge the appli-

cation of state statutes or procedures to this particular case only, and do not seek a declaration that the statutes or procedures are unconstitutional on their faces.

43. In the event that the Court determines that a three-judge court is required to hear any of the causes of action of this Amended Complaint, plaintiffs request that such a Court be promptly convened, and pending the convening of said Court this Court issue the requested preliminary relief pursuant to the provisions of 28 U.S.C. § 2284(3).

Respectfully submitted,

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MEMORANDUM OPINION

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI DELTA DIVISION

AARON HENRY, ET AL,
Plaintiffs,

versus No. DC 69-58-S

FIRST NATIONAL BANK OF CLARKSDALE, ET AL,
Defendants.

This action has been submitted to the Court on numerous motions filed herein by the parties. In order to understand the issue presented by the motions it is proper that a chronological resume be made of the procedural steps which have been taken herein.

The many issues before the Court have grown out of the filing of a suit in the Chancery Court, First Judicial District, Hinds County, Mississippi.[1] On or about November 4, 1969, Caliborne Hardware Company, Inc., and others, most of whom are resident citizens of the City of Port Gibson, Claiborne County, Mississippi, filed a Bill of Complaint in the State Court to enjoin the National Association For The Advancement Of Colored People (NAACP), a foreign corporation organized and existing by virtue of the laws of the State of New York, but authorized to do and doing business

[1] This State suit will be referred to in this opinion as the "State Action".

in the State of Mississippi, the Mississippi Action For Progress, (MAP), a non-profit Mississippi Corporation, and numerous individuals from picketing or causing to be picketed and from encouraging or causing to be encouraged a boycott of the businesses of complainants in the City of Port Gibson. The complainants also sought damages from the defendants in the aggregate sum of $3,542,466.04.

The complainants in the State Action prayed for and obtained a non-resident attachment in Chancery against NAACP, *its branches or auxiliary offices* in the State of Mississippi. This relief was sought under Sections 2729, et seq., Mississippi Code, 1942, Annotated, Recompiled (1957), which provde generally for the attachment in Chancery of the effects of a non-resident, absent or absconding debtor in the hands of persons in this state.[2]

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[2]Sections 2729 and 2730, Mississippi Code, 1942, Annotated, Recompiled (1957), provide:

"§2729. Non-residents — absent or absconding debtors.

The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any non-resident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor. The court shall give a decree in personam against such non-resident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance.

§ 2730. Attachment against non-residents — how effects or indebtedness bound.

One of the defendants in the case sub judice, First National Bank of Clarksdale, (FNBC) and fifty-five other banks in the State of Mississippi were made parties defendant in the State Action, and were said to have funds or effects of NAACP, its branches or auxiliary offices, in their hands which were subject to non-resident attachment in the action. Process was issued and duly served in the state on all defendants including FNBC and the other defendant banks named in the complaint.

The Mississippi State Conference of the National Association For The Advancement Of Colored People (State Conference), an unincorporated association, resident of Mississippi, and the Coahoma County Branch Of The National Association For The Advancement Of Colored People (Coahoma Branch), an unincorporated association, resident of Mississippi and a member of the State Conference, filed a verified complaint in the case sub judice on November 7, 1969. The Bank of Clarksdale, Coahoma National Bank, and

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When a bill shall be filed for an attachment of the effects of a non-resident, absent or abscounding debtor in the hands of persons in this state, or of the indebtedness of the defendant in this state to such non-resident, absent or abscounding debtor, it shall be sufficient to bind such effects or indebtedness, that the summons for the defendant resident in this state shall have stated in or endorsed upon in the nature and object of the suit, and that it is subject to the effects in the hands of the resident defendant, and the indebtedness of such defendant to the non-resident, absent or abscounding debtor, to the demand of the complainant; or, instead of such statement on the summons, a copy of the bill may be served with the summons, and shall bind the effects or indebtedness from the time of such service."

FNBC, are named as defendants in the action, and are sued as a class, the members of which are alleged to be all other banks, who were named as defendants in the State Action.

The complaint alleged that the State Conference is an unincorporated association, a resident of Mississippi and the owner of the property situated within the state; that the Coahoma Branch is an unincorporated association, a resident of Mississippi, and the owner of property situated within the state, and that each member of the class is an unincorporated association, a resident of Mississippi and the owner of property situated within the state.

The State Conference and the Coahoma Branch filed the action through Aaron Henry, a resident of Coahoma County, Mississippi, who is president of both the State Conference and the Coahoma Branch. The Coahoma Branch brought the action in the case sub judice for all other local NAACP Branches within the State of Mississippi.

The plaintiffs allege that although they and each member of the class represented by the Coahoma Branch are authorized by NAACP to use the words "National Association For The Advancement Of Colored People" as a part of the title of their respective associations, and have agreed to abide by the constitution of NAACP, they are completely autonomous and independent of NAACP, and that the branches are autonomous and independent of the State Conference.

The plaintiffs also allege in the complaint that they and the members of the class represented by the Coahomá Branch are not defendants to the State Action.

The plaintiffs allege in the complaint that as a result of the State Action the funds of plaintiffs and members of the class represented by plaintiff Coahoma Branch, have been sequestered in the hands of the banks named as defendants in the State Action and thus, such funds are not available for their use in the promotion of the activities in which they are engaged i.e. activities protected by the First Amendment to the Constitution of the United States designed to secure the equal rights of the Negro citizens of the State of Mississippi and the United States.

The plaintiffs allege, inter alia, that the funds aforesaid have been sequestered in an action to which they and the members of the class represented by the Coahoma Branch are not parties, without notice of any kind or an opportunity to be heard; that the attachment has and will in the future cause extraordinary and irreparable injuries to them and the said class; that plaintiffs and the members of said class are seriously hampered in their day to day activities; that prospective members of or contributors to the branches aforesaid have been frightened and deterred from joining or contributing money to the branches; that persons who would otherwise associate to engage in activities protected by the constitution have been frightened and deterred from engaging in such activities from fear that their property might be attached because of some presumed connection with a non-resi-

dent organization; and that the State Action was filed by the complainants therein with such a callous indifference to the rights of others as to amount to malice and bad faith.

Plaintiffs bring the action sub judice pursuant to 42 U.S.C.A. § 1983, the Civil Rights Statute of April 20, 1871, and invoke the jurisdiction of the court under 28 U.S.C.A. §§ 1331 and 1343.

Plaintiffs moved for a temporary restraining order requiring defendant banks to release the funds aforesaid. The Bank of Clarksdale and the Coahoma National Bank answered the action and affirmatively stated that they did not have possession of or control over any funds subject to the attachment process of the State Action. These defendants were dismissed from the action. The FNBC answered, and acknowledged that it had in its possession and under its control certain funds belonging to the Coahoma Branch.

A hearing was held by the Court on plaintiffs' motion for a temporary restraining order at Aberdeen on November 17, 1969. FNBC Appeared at the hearing and in the course of the trial, moved ore tenus that the complainants in the State Action be made parties defendant to the action, sub judice, on the ground that such parties claimed an interest in the funds in its possession belonging to the Coahoma Branch, and were, therefore, necessary and proper parties to the pending action.

The Court being of the opinion that the action could not proceed to final judgment without the appearance of the complainants in the State Action, directed that such parties be made parties defendant to the action. Pursuant to the Court's order, plaintiffs caused a summons, together with copies of the complaint, motion for preliminary injunction and temporary restraining order issued by the Court, to be served on each of such State Action, complainants as hereinbefore indicated. The Court entered a temporary restraining order requiring FNBC to release all funds in its possession belonging to plaintiff Coahoma Branch, from the attachment issued in the State Action upon the posting by the plaintiffs of a bond in the aggregate amount of the funds attached, plus the sum of $1,000.00. The order provided for steps to be taken by which funds in the hands of other banks, members of the class represented by FNBC, might be released from the attachment process.

The Court set a hearing on the motion for a preliminary injunction at Oxford, Mississippi on December 1, 1969. A hearing was held at the appointed time. The complainants in the State Action appeared in response to the summons issued and duly served upon them, and filed a motion to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted and that the Court lacked jurisdiction of the subject matter.

At the conclusion of the hearing the Court announced from the bench his decision to grant the motion for a preliminary injunction and deny the motion to dismiss. The Court requested counsel to prepare an ap-

propriate order. Counsel could not agree on an appropriate order. The Court received proposed orders from counsel for plaintiffs and counsel for defendants, complainants in the State Action. The proposed orders were made a part of the record in the case. The Court entered its own order December 15, 1969, but it was not lodged with the Clerk until December 16, 1969. In the order overruling the motion to dismiss, which was separate from the one ordering the issuance of a preliminary injunction, the Court provided that the said defendants might make application to the Fifth Circuit Court of Appeals for an interlocutory appeal from the order, pursuant to 28 U.S.C. § 1292(b). The said defendants made application to the Court of Appeals for the Fifth Circuit for an interlocutory appeal, which was denied on March 4, 1970.[3]

On the day before the Court's orders carrying into effect the decision of the Court, announced at the hearing on December 1, 1969, were lodged with the Clerk, that is on December 15, 1969, NAACP filed herein a motion to intervene as a party plaintiff. Plaintiffs also filed a motion on that day to make MAP a party defendant.

NAACP, State Conference, Coahoma Branch, individually and on behalf of all others similarly situated, and Aaron Henry, individually and on behalf of all others similarly situated, filed an amended complaint which greatly enlarged the scope of the issues in the case. Aaron Henry appeared in the original complaint

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[3]Claiborne Hardware Co., et al v. Aaron Henry, et al, Misc. No. 1583.

in his official capacity of President of State Conference and Coahoma Branch, but not as an individual. In the amended complaint he appeared as an individual and as representative of a class consisting of all individuals named as defendants in the State Action.

The amended complaint makes MAP a party defendant and in essence makes a direct attack on the State Action. In the first cause of action in the amended complaint plaintiffs seek a declaratory judgment that plaintiffs and members of the class represented by plaintiffs have First and Fourteenth Amendment rights to peacefully picket, march, demonstrate, distribute leaflets or otherwise publicize and protest their grievances of racial discrimination and denial of equal rights by either the business community or officials of Port Gibson or Claiborne County, to conduct an economic boycott of merchants they believe are acting in a racially discriminatory manner, and to urge others to comply with such boycott. In the first cause of action plaintiffs also seek an injunction restraining defendants, complainants in the State Action, from prosecuting the suit.

The second cause of action in the amended complaint seeks a declaratory judgment that Sections 2729-2734, Mississippi Code, 1942, Annotated, Recompiled (1957) are unconstitutional on their face and as applied in the State Action deprive persons subject to attachment thereunder of the due process and equal protection of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The second cause of action also seeks an injunction against the defendant banks in the case sub judice from detaining in any way the funds of plaintiffs.

The third cause of action in the amended complaint seeks a declaratory judgment that State Conference, Coahoma Branch and the branches represented by Coahoma Branch as a class are residents of the State of Mississippi and are not subject to the provisions of Sections 2729-2734 of the Mississippi Code of 1942, Annotated, Recompiled (1957). Injunctive relief as prayed for under the second cause of action is also sought under the third cause of action.

In the fourth cause of action in the amended complaint plaintiffs seek to have the Court declare unconstitutional Section 2059.3, Mississippi Code of 1942 (1958 Supp.), (Conspiracy-unlawful restraint of trade-civil liability) and restrain defendants, complainants in the State Action, from prosecuting or continuing to prosecute the State Action or other suits against plaintiffs in which recovery is dependent on the validity of Section 2059.3.

The fifth cause of action in the amended complaint seeks a declaratory judgment that Sections 1088 and 1089 of the Mississippi Code of 1942, Annotated, Recompiled (1957) which prohibit certain trusts, combines or other agreements in restraint of trade when inimical to public welfare, cannot constitutionally be applied to restrain First Amendment activities, such as described in the amended complaint. Injunctive relief is sought restraining defendants, complainants in the State Action, from prosecuting or continuing to prosecute the State Action or any other suit against plaintiffs in which it is sought to restrict First Amendment rights on the basis of said Sections 1088 and 1089.

The sixth cause of action set forth in the amended complaint seeks a declaratory judgment that plaintiffs are entitled to a jury trial in the event the State Action proceeds to trial, and an injunction restraining defendants, complainants in the State Action, from bringing the State Action on for trial on the issue of money damages unless plaintiffs are accorded the right to trial by jury.

The amended complaint does not seek a Three-Judge Court to hear the constitutional issues presented in the second and fourth causes of action, since plaintiffs do not seek to restrain the action of any officer of the state, and, as to the constitutional questions presented by the Fifth and Sixth causes of action, plaintiffs do not seek a Three-Judge Court, since they do not seek injunctive relief against any officer of the state, neither do they seek a declaration that the statutes involved in said causes are unconstitutional on their face, but rather the application of the statutes and procedures to this particular case only.

The amended complaint was filed without plaintiffs having first obtained an order from the Court permitting such to be done. The motion to intervene filed by NAACP, sought leave for NAACP to intervene as a plaintiff in the action, in order to assert the claims set forth in the amended complaint submitted with the motion. The motion was bottomed on the ground that the case sub judice seeks, inter alia, an injunction against the State Court proceedings, in which NAACP is a party defendant and in which it has an interest. NAACP also asserted that its claims involve questions

of law and facts common to those raised by all the plaintiffs in the action.

The plaintiffs filed, on December 31, 1969, a motion for a preliminary injunction restraining defendants, complainants in the State Action; from further prosecuting said action or causing the same to be prosecuted. Plaintiffs assert as grounds for the motion that such an injunction is necessary to prevent irreparable injury to plaintiffs pending the ultimate determination of the case sub judice; to preserve the status quo of the parties until final determination of the action; to permit the Court to grant full and effective relief in the event plaintiffs ultimately prevail; and to prevent expense and waste in the event that plaintiffs are ultimately successful in the action.

On January 6, 1970, defendants, complainants in the State Action, filed a motion for change of venue to the United States District Court for the Southern District of Mississippi, asserting that such a change is warranted for the convenience of the parties and in the interest of justice.

On January 16, 1970, defendants, complainants in the State Action, noticed the depositions at Clarksdale, Mississippi, January 26 — January 30, 1970 of ten individuals, members of the class represented by plaintiff Aaron Henry.

On January 22, 1970 plaintiffs noticed the depositions of six of the defendants, complainants in the State Action, at Clarksdale, Mississippi on February 2, 1970.

On January 28, 1970 defendants, complainants in the State Action, filed a motion to strike the amended complaint and dismiss the action. The basis of the motion is the alleged refusal of the ten individuals noticed for depositions, as aforesaid, to appear for the deposition. There is attached to the motion copy of letter written by plaintiffs' counsel in which the position was taken that the named individuals, though members of the class represented by plaintiff Henry in the suit, were not themselves parties for the purpose of discovery under the Federal Rules, but rather witnesses, who must be dealt with as such. Counsel insisted that to secure the attendance of the individuals at the deposition, they were entitled to the service of subpoenas and payment of fees and mileage, pursuant to the provisions of Rule 45, Federal Rules of Civil Procedure.

There is attached to the motion a copy of a stipulation filed in the case in which it is agreed that notice of the taking of the depositions was duly served on counsel for plaintiffs; that defendants had not personally served the said individuals with subpoenas or other notice of the taking of the depositions, nor had they tendered witness fees or mileage to said individuals; that should the individuals appear for the depositions defendants would not serve subpoenas upon them, nor tender witness fees or mileage; and that plaintiffs' attorneys would not cause the persons named in the notice of the depositions to appear at the time and place indicated.

On January 28, 1970 defendants filed a motion to stay taking of depositions of defendants by plaintiffs until

defendants completed depositions on oral examination of plaintiffs and witnesses. The Court entered an order on this motion on February 5, 1970, staying the taking of depositions by all parties until further orders of the Court.

All outstanding motions were heard by the Court at Oxford, Mississippi on February 26, 1970, at which time the Court took all motions under advisement and requested additional briefs.

The Court has now received and considered elaborate, excellent, exhaustive and extensive briefs from the parties in support of all motions, and has carefully studied and reviewed the entire record in the case.

THE AMENDED COMPLAINT
THE MOTION TO INTERVENE
THE MOTION TO ADD PARTY DEFENDANT

At the threshold the Court must determine whether to recognize the amended complaint filed by original plaintiffs, NAACP, and Aaron Henry, individually, and as the representative of a class composed of all individual defendants in the state action. On this issue rests the determination of many questions here involved.

Defendants[4] question the appropriateness of the Court's action ordering them to be made parties defendant herein on the ore tenus motion of PNBC at the initial hearing in this case.

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[4]The defendants, complainants in the State Action, will be referred to in the remainder of this opinion as "defendants".

As hereinbefore mentioned, the Court's action was prompted by the assertion by FNBC that the Court could not finally determine the issues involved and render complete relief between those already made parties without the presence of defendants. Defendants claim an interest in the deposits of Coahoma Branch with FNBC to the extent that the money represented thereby may be subjected to the demand of defendants in the state action. FNBC is a mere stakeholder and has no interest in the outcome of the litigation. It is apparent that the Court would be powerless to finally dispose of the case without the presence of defendants, who, by virtue of their claims against the funds mentioned, are indispensable parties. The Court is of the opinion that the Court's action in this regard was proper.

Defendants allege in the State Action that the original plaintiffs herein are branches of NAACP, the non-resident defendant. Thus, one of the issues involved in the case sub judice, is the relationship of the original plaintiffs to NAACP.

Another issue tendered by the original complaint is the contention of the original plaintiffs that the State Action infringes upon their First Amendment Rights.

The amended complaint was filed after defendants appeared in the action pursuant to process served upon them, but before they answered the complaint. At the time the amended complaint was filed FNBC had answered, but gave its consent to the filing of the amended complaint.

Under these circumstances the original plaintiffs were entitled to file the amended complaint as a matter of right without an order of the Court, with the exception that the original plaintiffs could not effectively add parties to the action without the Court's permission.[5]

The original plaintiffs named NAACP as a party plaintiff and MAP as a party defendant in the amended complaint in order to avoid further amendment should the Court sustain in their motion to add MAP as a party defendant and NAACP's motion to intervene.

NAACP seeks to intervene pursuant to the provisions of Rule 24(a) (2) of Federal Rules of Civil Procedure,

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[5]Rule 15(a) Federal Rules of Civil Procedure provides "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *."

It is held in Moore's Federal Practice, Second Edition, Vol. 3, page 851, § 15.07(2):

"The term 'a responsive pleading' as used in Rule 15(a) should be interpreted by reference to Rule 7(a), which defines 'pleadings' as including only the complaint, the answer, the reply, the answer to a cross-claim, and the third-party complaint and answer. So it has been held that a motion to dismiss for failure to state a claim is not a 'responsive pleading' within the meaning of Rule 15, and pleadings may be amended after such motions are made."

As to adding parties, Moore's holds at page 858, in Vol. 3, as follows:

"Rule 21 governs the procedure for dropping or adding parties, and requires an order of the court. Consequently a party may not be added by amendment of the complaint as of course."

See also International Brotherhood of Teamsters v. AFL-CIO, (ED Mich 1963) 32 FRD 441, 7 FR Serv2d 15a.32, Case 2, which holds that an amendment to complaint to add or drop a party requires an order of the court under Rule 21, which controls and limits Rule 15(a).

which provide for intervention of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties", and Rule 24(b) (2) which provides for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common".

The motion of NAACP to intervene is bottomed on the contention that it is a defendant in the State Action, against which an injunction is sought in the action sub judice, and therefore has an interest relating to the subject matter of the action, and that its claims involve questions of law and fact common to those raised herein by the original plaintiffs.

It is clear to the Court that NAACP cannot intervene herein as a matter of right. While NAACP claims an interest relating to the transaction which is the subject of the action sub judice, it does not claim that its interest is not adequately represented by the existing parties. Both of these elements are necessary when the intervention is sought as a matter of right.[6] Rule 24(a)

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[6] In Atlantis Development Corporation v. United States, 5 Cir. 1967, 379 F.2d 818, at page 825, the court said:

> "Of course F.R.Civ.P. 24(a) (2) requires both the existence of an interest which may be impaired as a practical matter and an absence of adequate representation of the intervenor's interest by existing parties. There can be no difficulty here about the lack of representation."

(2) F.R. Civ. P.

Since NAACP does not claim that the original parties will not adequately represent its interest in the case, intervention cannot be allowed as a matter of right.

If NAACP is permitted to intervene, such must be done under the provisions of Rule 24(b) (2) of F. R. Civ. P.

It is at once apparent that NAACP's claims and the main action herein have questions of law and fact in common

The general purpose of the Rules of Federal Procedure is that they "shall be construed to secure the just, speedy, and inexpensive determination of every action". F. R. Civ. P. Rule 1.

The Court is of the opinion that the disposition of the case sub judice may as a practical matter impair or impede the ability of NAACP to protect the interest which it claims in the subject matter of the action. In a very real and practical sense the trial of this action is the trial of NAACP's suit as well.

While the decision in the case sub judice will not constitute res judicata or be binding as a matter of law on NAACP, if its motion to intervene is denied, for all practical purposes, the decision will, as a matter of stare decisis, control the trial of the issues in a subsequent separate action by NAACP.

The Court's decision in this case will more than likely be appealed to Circuit Court of Appeals, and the decisurely control the disposition of similar or the same issues in a subsequent separate action between NAACP and defendants.

The Fifth Circuit, in discussing its adherence to the stare decisis doctrine said in *Atlantis*, Note 6, supra:

> "It also assumes that in the subsequent separate trial of the claim of Atlantis against the Government the prior decision would be followed as a matter of stare decisis. Do these assumptions have a realistic basis? Anyone familiar with the history of the Fifth Circuit could have but a single answer to that query. This Court, unlike some of our sister Circuit Courts who occasionally follow a different course, has long tried earnestly to follow the practice in which a decision announced by one panel of the Court is followed by all others until such time as it is reversed, either outright or by intervening decisions of the Supreme Court, or by the Court itself en banc. That means that if the defendants in the main action do not prevail upon these basic contentions which are part and parcel of the claim of Atlantis, the only way by which Atlantis can win is to secure a rehearing en banc with a successful overruling of the prior decision or, failing in either one or both of those efforts, a reversal of the earlier decision by the Supreme Court on certiorari. With the necessarily limit-

ed number of en banc hearings in this Circuit and with the small percentage of cases meriting certiorari, it is an understatement to characterize these prospects as formidable."

* * * *

We are dealing here with a conjunction of a claim to and interest in the very property and the very transaction which is the subject of the main action. When those coincide, the Court before whom the potential parties in the second suit must come must itself take the intellectually straight forward, realistic view that the first decision will in all likelihood be the second and the third and the last one. Even the possibility that the decision might be overturned by en banc ruling or reversal on certiorari does not overcome its practical effect, not just as an obstacle, but as the forerunner of the actual outcome. In the face of that, it is 'as a practical matter' a certainty that an absent party seeking a right to enter the fray to advance his interest against all or some of the parties as to matters upon which he is for all practical purposes shortly to be foreclosed knows the disposition in his absence will 'impair or impede his ability to protect that interest,' * * * F.R.Civ.P. 24(a)(2)."[7]

In Moore's Federal Practice, Second Edition, Vol. 4, pages 59, 60, § 24.10, the author says "The grant

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[7]379 F.2d 828, 829.

of intervention in many of the discretionary cases will facilitate the disposal in one action of claims involving common questions of law or fact, and thus avoid both court congestion and undue delay and expense to all parties. * * * The most obvious case of permissive intervention, of course, is the situation where an intervenor has a claim against the defendant similar to or identical with that asserted by the plaintiff".

In the case sub judice, aside from the original plaintiffs' claim that they are not subject to nonresident chancery attachment, because of Mississippi citizenship, the claims of NAACP are similar to or identical with those asserted by the original plaintiffs.

Rule 24(b)(2), F. R. Civ. P., provides: "In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties". There is nothing, present, in the action sub judice which tends to show that the intervention of NAACP will unduly delay or prejudice the adjudication of the rights of the original parties.

The Court is of the opinion that permitting NAACP to intervene in the case sub judice, will avoid undue delay and expense to all parties.

In support of their motion to add MAP as a party defendant it is shown that MAP is a party defendant in the State Action. The same reasons that motivated the Court to permit NAACP to intervene apply to the

F. R. Civ. P. provides "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest * * * * If he has not been so joined, the court shall order that he be made a party".

Rule 21, F. R. Civ. P. provides "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just".

The Court is of the opinion that the motion of plaintiffs to make MAP a party defendant to this action is well taken and should be sustained.

It follows, as a matter of course, after permitting the intervention of NAACP, and directing that MAP be made a party defendant, that the Court should permit the filing of the amended complaint.

MOTION TO DISMISS

Defendants move the Court to dismiss the amended complaint on four grounds.

The first ground reasserts by reference the grounds set forth in the motion to dismiss the original com-

plaint. The Court has previously overruled defendants' motion to dismiss the original complaint. The motion to dismiss the amended complaint for the reasons set forth in the prior motion does not present new or additional principles of law. The motion does not appear to be well taken on the first of the four grounds asserted by defendants.

The second ground asserts that the original complaint cannot be amended while the case is pending on appeal in the Court of Appeals from the Court's order of December 15, 1969, overruling defendants' motion to dismiss for failure of the complaint to state a cause of action. This question is now moot for the reason that on March 4, 1970, the Circuit Court of Appeals, refused to entertain the interlocutory appeal.

The third ground for the motion alleges that the attempted action on the part of the plaintiffs is in controvention of 28 U.S.C. § 2283. The Court is of the opinion that this section is not applicable in the case sub judice.

The fourth ground is in effect, a motion to strike, and, in the opinion of the Court is not well taken.

It is the Court's judgment that the motion to dismiss is not well taken and should be overruled.

MOTION TO STRIKE COMPLAINT AND DISMISS ACTION

Defendants move the Court to strike the amended complaint and dismiss the action. In support of the

motion defendants aver that they noticed the depositions of the individuals described in the amended complaint, as members of the class represented by plaintiff Aaron Henry, and that they willfully refused to appear at the time and place indicated and submit to the depositions. Defendants' motion is directed to the amended complaint in its entirety and does not seek to dismiss the same only as to the said individuals. Defendants argue that the individuals occupy the status of named plaintiffs and are subject to sanctions by the Court for failure to appear and submit to discovery depositions, without being subpoenaed as witnesses.

The plaintiffs contend that the individuals are members of a class represented by an individual plaintiff, Aaron Henry, and do not have the status of named plaintiffs as as to subject them to the discovery rules.[8]

Initially it is noticed that the motion to dismiss is general, and seeks dismissal, not only as to said individuals, but also as to the other plaintiffs who are not charged with failure to respond to discovery procedures. The willful failure of the eight individuals to

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[8]Rule 37(d) F. R. Civ. P. Provides:

"FAILURE OF PARTY TO ATTEND OR SERVE ANSWERS. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

appear for the deposition could not in any view of the matter justify the dismissal as to other plaintiffs. In the case of *Denenlenaere v. Rockwell Mfg. Co.*, D.C. N.Y. 1959, 23 F.R.D. 686, the Court held that the failure of five of eight plaintiffs to appear for taking of their depositions would not justify dismissal as to all eight.

The Court has not determined that the action sub judice can be maintained as a class action on behalf of the individual defendants in the State Action. Rule 23(c) (1) F. R. Civ. P. provides "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained".

It is clear, therefore, that at this stage of the case, the individuals aforesaid are not parties to the action in any sense of the word. They are not named plaintiffs, and the Court has not determined by order that the action may be maintained as a class action for their benefit.

The Court is of the opinion that the motion to strike complaint and dismiss action is not well taken and should be overruled.

The Court has considered but declines to act at this time on the question of whether the said individuals, as members of a class, should be considered in the same category as named plaintiffs for discovery purposes. In the present posture of the case a decision of the question is not necessary.

MOTION TO STAY TAKING OF DEPOSITIONS OF DEFENDANTS UNTIL DEFENDANTS HAVE COMPLETED DEPOSITIONS ON ORAL EXAMINATION OF PLAINTIFFS AND WITNESSES

When this motion to stay was filed the Court was of the opinion that the posture of the case was such that the taking of depositions on oral examination should be stayed until further orders of the Court, accordingly such an order was entered.

The position of defendants is that once they start taking depositions of the parties and other witnesses, they are entitled to proceed until they have concluded the examination of all parties and any other person known to have information concerning the issues involved in the litigation; and during this period the plaintiffs should not be entitled to proceed with discovery depositions in their behalf.

This seems to the Court as an impractable position. Defendants might not conclude their discovery before trial. There is no known legal standard by which plaintiffs could determine when defendants concude the taking of depositions, except to inquire of defendants. In such a situation plaintiffs would be at the mercy of defendants.

The record shows that defendants noticed the taking of depositions of the individuals above mentioned on January 16, 1970. Plaintiffs noticed the depositions of certain defendants on January 26, 1970. Defendants contend that having given notice of the taking of depositions first, they are entitled to proceed not only with

the taking of the depositions of the individuals designated in the notice, but of all other persons whom they desire to depose. Such a procedure would produce absurd results.

The Court is of the opinion that the correct, proper and reasonable rule is stated in Moore's Federal Procedure, Second Edition, Vol. 4, § 26.13(2) page 1151. Professor Moore states: "Also the party having priority is entitled to complete the taking of depositions *noticed* by him before the adversary party is permitted to institute discovery proceedings-depositions, interrogatories, or production of documents -- of his own". (Emphasis supplied)

In the case sub judice defendants noticed the depositions of ten individuals at Clarksdale, Mississippi to begin on January 26, 1970, and to end on January 30, 1970. The notice was served on counsel for plaintiffs on January 16, 1970.

Plaintiffs noticed the deposition of six defendants for Clarksdale, Mississippi on February 2, 1970. The notice was served on January 20, 1970.

Thus, plaintiffs recognized the priority of defendants' depositions during the period of January 26, 1970 and January 30, 1970. This was all that plaintiffs were required to do under the priority rule. Defendants' priority extended only to the depositions already noticed by them.

The motion to stay depositions is not well taken and should be overruled. The parties should be left free to pursue discovery procedure as they desire, subject, of course, to compliance with the Federal Rules and principles of law applicable thereto.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs contend that the Court should preliminarily enjoin defendants from prosecuting the State Action because the trial of that action, while the case sub judice is pending, will effectively deprive plaintiffs of the opportunity of obtaining full and adequate relief in the case sub judice.

Plaintiffs support their motion with the contention (1) that the Court has jurisdiction of the action; (2) that plaintiffs' constitutional rights, particularly First Amendment rights, will be infringed by the State Action while this suit is pending; (3) that fundamental equitable considerations show that preliminary injunctive relief is appropriate, and (3) that 28 U.S.C.A. § 2283 does not bar issuance of a preliminary injunction.

The parties have submitted elaborate and extensive briefs in support of their respective positions on this motion. The Court has given careful consideration to all points urged upon the Court.

The thrust of this action is the claim by plaintiffs that their First Amendment rights have been infringed

by defendants by the utilization of the machinery of the state courts. This, plaintiff contends, satisfies the color of state law requirement.

Section 1331(a), Title 28 U.S.C.A. provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.20, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States".

Section 1343 (3) Title 28 U.S.C.A. provides that the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States".

Section 1983, Title 42 U.S.C.A. provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It was held by the Supreme Court in *Shelley v. Kraemer*, 1948, 334 US 1, 92 L ed 1161 that the action of state courts and of judicial officers in their official capacities, even though taken for the enforcement of private agreements, is state action within the provisions of the Fourteenth Amendment (that no state shall deny to any person within its jurisdiction the equal protection of the laws.

In *Edwards v. Habib*, D. C. Cir. 1968, 397 F.2d 687, 694, the court said:

> "A state court judgment, then, even by adjudicating private lawsuits, may unconstitutionally abridge the right of free speech as well as the right to equal protection of the laws."

In *New York Times Co. v. Sullivan*, 1964, 376 U.S. 254, 11 L ed 2d 686, 697, 84 S Ct 710, 95 ALR 2d 1412, the Supreme Court said:

> "We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court — that 'The Fourteenth Amendment is directed against State action and not private action.' That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of

> speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See e. g., Alabama Code, Tit 7, §§ 908-917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."

The Court is of the opinion that the amended complaint herein states a cause of action cognizable by the Court under 28 U.S.C.A. §§ 1331(a), 1343(3) and 42 U.S.C.A. § 1983.

Defendants charge in the State Action that plaintiffs conspired each with the other to ruin and cause injury to the businesses of the defendants without any purpose of protecting or advancing any legitimate interest of their own. In carrying out this unlawful conspiracy, defendants charge that plaintiffs daily committed malicious, illegal and unlawful acts of injurious falsehoods, deception, force, intimidation, threats, coercion and violence against the customers and prospective customers of defendants. Defendants charge plaintiffs with a secondary boycott of their businesses, maliciously contrived and executed, by coercing the customers and prospective customers of defendants, against their will, to withdraw and withhold their beneficial business intercourse from defendants, by the infliction or threat of physical injury to said customers and prospective customers, and by such intimidation as to place

such customers and prospective customers in fear of injury and bodily harm.

The defendants also charge plaintiffs with massive picketing of their places of business; making public speeches against trading with defendants; stationing guards near their businesses to physically stop customers and prospective customers from entering the business premises of defendants and to threaten those who traded with defendants with physical violence; and with many other acts of violence or threatened violence toward customers and prospective customers of defendants, should they trade with defendants.

In sum, defendants charge plaintiffs with carrying into effect a boycott of their businesses, and forcing others to do the same, through picketing, speaking, violence and threats of violence.

As the result of the alleged conduct of plaintiffs, it is charged that defendants suffered large losses in the operation of their businesses for which they seek recovery against plaintiffs in a sum aggregating $3,542,466.04.

Defendants also charge plaintiffs with tortious interference with the rights of defendants to pursue their lawful trades and businesses and the violation of certain statutes of the State of Mississippi relative to restraint of trade. Defendants seek to restrain plaintiffs from picketing and boycotting their businesses and

from violating certain Mississippi Statutes relative to restraint of trade.[9]

Defendants prayed for and obtained a non-resident Chancery attachment[10] of the funds of plaintiffs in fifty-six banks in Mississippi.

Plaintiffs contend that their activities consisted of picketing and boycotting and encouraging others to picket and boycott the businesses of defendants in protest of racial discrimination which had been and was being practiced by defendants in the operation of their businesses, and by the officials of the city in which defendants operated their businesses. Plaintiffs contend that their activities are constitutionally protected by the first amendment, and that, as citizens of the United States, they have the right of the free expression of their views.

The State Action, plaintiffs contend, has a chilling effect upon their activities against which they are entitled to relief in this Court. Plaintiffs seek a preliminary injunction to protect their asserted rights until the case can be tried on its merits.

At the hearing on the motion for a preliminary injunction the Court accepted a copy of the sworn bill of complaint filed in the State Action in lieu of affi-

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[9]Mississippi Statutes which defendants claim were violated by plaintiffs include §§ 1088, 1089 and 1092, Mississippi Code 1942, Annotated, Recompiled.

[10]Id. §§ 2729, et seq.

davits. This document sets forth the facts as have been hereinbefore enumerated.

The plaintiffs submitted the affidavits of eleven individuals; defendants in the State Action. The affidavits are similar. In substance the affidavits relate that the affiants have boycotted the places of business of the defendants, but have not threatened anyone else in regard thereto, nor have they been threatened in the matter; that they have no knowledge of violence or threats of violence to any other party; and that they have engaged in and encourage the boycott to support grievances which they feel are justified that those involved have discriminated and are discriminating against members of the Negro race.

The question presented to the Court on the motion for a preliminary injunction is whether the facts as shown by the sworn bill of complaint filed in the State Court and the affidavits filed herein by plaintiffs present a case where the Court should exercise its injunctive power to maintain the status quo of the parties until the case can be heard on its merits.

There is little doubt but that the right of plaintiffs to peacefully picket and boycott the businesses of defendants and urge others to do so, is a right which they can enjoy, guaranteed to them by the first amendment. *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 1968, 391 U S 308, 20 L ed 2d 603, 88 S Ct. 1601; *Thornhill v. Alabama*, 310 U S. 88, 84 L ed 1093; *Kelly v. Page*, 5 Cir. 1964, 335 F.2d 114. The court said in *Kelly*, at page 119, as follows:

> "Peaceful picketing for the object of eliminating racial discrimination in department stores open to the general public is a right embraced in free speech under the First Amendment to the Constitution, and made applicable to the states by the Fourteenth Amendment."

On the other side of the coin violence or threats of violence have no protection under the cloak of First Amendment Rights. In *Smith v. Grady*, 5 Cir. 1969, 411 F.2d 181, 188, 189, Judge Coleman speaking for the Fifth Circuit said:

> "This Court recognizes, as do all courts, that First Amendment rights are zealously to be protected. In fact, the decision of this case turns chiefly on conduct, rather than speech. Of course, we take into consideration epithets addressed to customers and language which in all reason must be considered as insulting or threatening. At the same time, we are convinced that if peaceful picketing is allowable, as, for instance, not in the furtherance of an unlawful purpose, then a command of absolute silence is constitutionally impermissible.
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> * * * *
>
> On a picket line, however, and particularly in the support of a boycott of a lawful business, the Constitution affords no protection to speech which is violent, threatening, menacing, insult-

ing, or clearly calculated to provoke a breach of the peace by others."

The defendants contend, however, that 28 U.S.C.A. § 2283 bars the prosecution of this action wherein the plaintiffs seek an injunction against the prosecution of a State Action.

It is provided in 28 U.S.C.A. § 2283 that "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments".

This section of the Code has been the subject of much litigation in recent years, and many decisions have been rendered by appellate and district courts in the nation discussing the applicability of the statute and its scope.

However, the Court need not go further than the Fifth Circuit to dispose of this issue. In the case of *Machesky v. Bizzell*, 5 Cir. 1969; 414 F.2d 283, the court considered an action arising in the Northern District of Mississippi wherein plaintiffs sought injunctive relief against the enforcement of an injunction issued by the State Chancery Court. The Fifth Circuit, speaking through Judge Bell, said:

"Our decision is grounded on the premise that § 2283 is non-jurisdictional in that it is no more than a statutory enactment of the prin-

ciple of comity for application in the relationship between federal and state courts. As such, it is to give way in those extraordinary cases where the federal injunction is necessary to vindicate clear First Amendment rights. The question, on this premise, becomes whether appellants alleged such a case."[11]

"We hold that the state court injunction here is unconstitutionally overbroad in that it lumps the protected with the unprotected in such a way as to abridge important public interests in the full dissemination of public expression on public issues. We hold also that where important public rights to full dissemination of expression on public issues are abridged by state court proceedings, the principles of comity embodied in § 2283 must yield, and that the district court is empowered to enjoin the state court proceedings to the extent that they violate these First Amendment rights."[12]

The Court is of the opinion that the Court is empowered to enjoin the State Action, if the facts of the case justify it, to the extent that such State Action may violate the First Amendment rights of plaintiffs, as hereinbefore discussed.

The recital of the issues drawn in the State Action, hereinbefore contained, indicates to the Court that plaintiffs can legitimately claim that defendants seek

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[11] 414 F.2d 287.
[12] 414 F.2d 291.

to infringe upon their First Amendment rights, and the prosecution of the State Action will have a chilling effect upon the exercise of those rights. This appears to be a proper case for the issuance of a preliminary injunction to hold the matters in status quo until the rights of the parties can be ascertained. Otherwise, plaintiffs will suffer irreparable injury on account of loss of First Amendment rights pending a solution of the differences between the parties.

The Court does not intend to and does not hold that plaintiffs may not be held to accountability in the State Action for any conduct which is not protected by the first amendment, such as violent, threatening, menacing or insulting conduct, or such as is clearly calculated to provoke a breach of the peace by others.

MOTION FOR CHANGE OF VENUE

Defendants filed a motion for change of venue to the Southern District of Mississippi, asserting in essence that the convenience of the parties and witnesses justified and required such a change.[13] It is not controverted that practically all of the parties who may be affected by the outcome of this litigation, with the exception of the defendant banks, reside in the Southern rather than the Northern District of Mississippi. The scene of the action giving rise to the controversy

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[13]The motion is apparently based on 28 U.S.C.A. § 1404(a) which provides:

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

between the parties is Port Gibson, Claiborne County, Mississippi. Port Gibson is situated in the Northern part of the Western Division. (Vicksburg) of the Southern District of Mississippi. The Greenville Division of this Court is 115 miles and the Delta Division when the case sub judice is docketed, 185 miles from Vicksburg.

While the Vicksburg Division of the Southern District of Mississippi would be a more convenient forum for the parties and their solicitors, the trial of the case either at Greenville or Clarksdale would not, in the opinion of the Court, create a great or excessive burden on the parties. Counsel for all parties in the case participate frequently in litigation before this Court at all of its division points.

Section 1404(a), Title 28 U.S.C.A., provides that "for the convenience of the parties and witnesses, an interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought". Plaintiffs contend that they could not bring this action in the Southern District of Mississippi for the reason that the three original defendants are citizens of the Northern District of Mississippi. In support of their contention, plaintiffs cite the case of *Hoffman v. Blaski*, 1960, 363 U S 335, 4 L ed 2d 1254, 80 S Ct 1084, in which the court said:[14]

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[14] 4 L ed 2d, 1262.

> "A defendant, properly served with process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default.... But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff."

Plaintiffs brought this action against three banks as representatives of a class of banks holding funds of plaintiffs, some of whom are residents of the Southern District of Mississippi. Plaintiffs contend that, for venue purposes, the residences of individual members of the class do not control, but only the residences of the named plaintiffs. *Wright, Class Actions,* 47 F.R.D. 169, 182 (1969). This argument does not impress the Court for the reason that plaintiffs could have selected a bank residing in the Southern District of Mississippi as the representative of the class against which to bring the suit. Thus, plaintiffs might have brought the suit in the Southern District of Mississippi.

Additionally, plaintiffs might have brought the suit in the Southern District of Mississippi because the claim arose in that district. Section 1391(b) Title 28 U.S.C.A. provides, "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law". It must be conceded

that this claim arose in the Southern District of Mississippi. The transaction giving rise to the suit occurred in Port Gibson, Claiborne County, Mississippi. The State Action which precipitated this action was filed in the Chancery Court, First Judicial District, Hinds County, Mississippi, in the Southern District. Hence, the claim arose in the Southern District and the suit could have been brought in that district by virtue of Section 1391(b), supra.

The Court is of the opinion that Section 1404(a) supra, authorizes the transfer of this action to the Southern District of Mississippi, should the Court find that a transfer for the convenience of the parties and witnesses, or the interest of justice requires such that a change of venue be granted.

Whether a change of venue should be ordered is a matter largely within the discretion of the Court. *Philip Carey Mfg. Co. et al v. Taylor*, 6 Cir. 1961, 286 F.2d 782, certiorari denied, 81 S Ct 1903, 366 U S 948, 6 L ed 2d 1242. Convenience of the parties will not alone justify a change of venue. The Court must be satisfied that a venue change will also be in the interest of justice.

The case sub judice was filed November 7, 1969. Defendants were made parties to the suit by order of the Court entered on November 17, 1969. Process was served on defendants on or about November 19, 1969. Defendants filed a motion to dismiss the action on December 1, 1969. This motion was overruled by the Court on December 15, 1969, and defendants were permitted to apply to the Circuit Court of Appeals for the Fifth

Circuit for an interlocutory appeal. This was denied on March 4, 1969.

On December 15, 1969, plaintiffs filed a motion to add MAP as a party defendant in the action, NAACP filed a motion to intervene as party plaintiff, and plaintiffs filed an amended complaint. In the meantime the Court entered a restraining order and a preliminary injunction against one of the original defendants, and members of the class represented by such defendant, directing the release of funds attached at the instance of defendants in their suit in the state court.

On December 30, 1969, defendants moved to dismiss the amended complaint, and on December 31, 1969, plaintiffs moved for a preliminary injunction to enjoin the prosecution of the State Action.

The motion for a change of venue was filed on January 6, 1970. Subsequent to the filing of the motion, the parties noticed discovery depositions, and thereafter defendants filed a motion to stay discovery depositions by plaintiffs and a motion to strike the amended complaint and dismiss the action, because of the failure of certain individuals, said by defendants to be parties to the action, to appear for depositions, when noticed to do so.

A hearing was held by the Court on all motions filed in the case on February 26, 1970, at which time affidavits and a copy of the sworn complaint filed by defendants in the State Action were filed with and considered by the Court on the motion for a preliminary

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A hearing was held by the Court on all motions filed in the case on February 26, 1970, at which time affidavits and a copy of the sworn complaint filed by defendants in the State Action were filed with and considered by the Court on the motion for a preliminary

injunction. The motions were argued before the Court and extensive and exhaustive briefs have been prepared by counsel and submitted to the Court for its consideration.

To grant a change of venue in the present posture of the case, in the opinion of the Court, would entail unnecessary expense and result in the waste of time on the part of all parties concerned. It does not appear, at this stage of the case, that the interest of justice will be served by the granting of the motion for a change of venue.

The motion for a change of venue will be overruled. The Court, however, reserves the right to give further consideration to the question as the case advances toward the trial date.

An appropriate order in line with the Court's holding will be entered in the case.

Dated June 9, 1970.

(Signed) ORMA R. SMITH
ORMA R. SMITH
UNITED STATES
DISTRICT JUDGE

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30295

AARON HENRY, ET AL,
Plaintiffs-Appellees,

versus

FIRST NATIONAL BANK OF CLARKSDALE, ET AL,
Defendants,
CLAIBORNE HARDWARE COMPANY, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Mississippi

(June 23, 1971)

Before RIVES, THORNBERRY and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge: In this interlocutory appeal, filed pursuant to 28 U.S.C.A. § 1292(a),[1]

[1] 28 U.S.C.A. § 1292(a) provides in pertinent part that:
The courts of appeals shall have jurisdiction of appeals

the defendants-appellants, who are also complainants in a pending state civil action instituted by them in Mississippi Chancery Court, contest the propriety and validity of an order of the United States District Court of the Northern District of Mississippi entered on June 9, 1970, in which that court preliminarily enjoined the appellants (hereinafter referred to as "state court complainants") from further prosecuting the aforementioned state civil action then pending in the Chancery Court of the First Judicial District of Hinds County, Mississippi. A clear picture of what has transpired so far in the court below, and of what is and *is not* raised in this interlocutory appeal, is essential to an understanding of our disposition of this case.

I. Facts and Procedural History

A. *Background*

This controversy began in 1966 when a group of Negro citizens in Port Gibson, Mississippi, began a movement designed to protest what they considered to be racial discrimination practiced by the white merchants and local officials of Port Gibson. The group sought to achieve fair employment practices, fair treatment of Negro customers, and to otherwise elimi-

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from:

> (1) Interlocutory orders of the district courts of the United States, . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . .

nate discrimination through the use of economic pressure in the nature of a boycott of the merchants in Port Gibson. The boycott was effectuated by picketing to publicize the action, and by other non-picketing activities such as leafleting and public meetings through which citizens of Port Gibson were encouraged to join the boycott. After this boycott had been in effect for several years, twenty-three white merchants of Port Gibson, who were subject to the boycott, joined in a suit filed on or about November 4, 1969, in State Chancery Court in Hinds County, Mississippi, against (1) the National Association for the Advancement of Colored People, a nonresident (New York) corporation; (2) the Mississippi Action for Progress, Inc. (MAP), a federally-funded nonprofit resident corporation, and (3) approximately 150 named individuals, adult residents of Mississippi alleged to be working "in concert with and under the direction of ... NAACP and MAP." (These three groups of defendants will be referred to hereinafter as the "state court defendants"). In addition, the state court complainants joined as defendants approximately fifty banks in the State of Mississippi alleged to have in their possession funds, property and effects of the nonresident defendant NAACP. The state court complainants alleged that the state court defendants had entered into a conspiracy in restraint of trade, and had engaged in secondary boycotts and other malicious and wrongful interference with the state court complainants' businesses, all in violation of the Mississippi Anti-trust Laws. Miss. Code Ann. 1088, 1089 (1942).[2] Among the allegations of the state court com-

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[2] § 1088. *Trust and combine — defined.*

A trust or combine is a combination, contract, understanding or agreement, expressed or implied, between two or more persons, corporations or firms or association of persons or between any one or more of either with one or more of the others, when inimical to public welfare and the effect of which would be:

(a) To restrain trade;

(b) To limit, increase or reduce the price of a commodity;

(c) To limit, increase or reduce the production or output of a commodity;

(d) To hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity;

(e) To engross or forestall a commodity ;

(f) To issue, own or hold the certificate of stock of any trust and combine within the spirit of this statute knowing it to be such at the time of the issue or the acquisition or holding such certificate; or

(g) To place the control to any extent of business or of the proceeds or earnings thereof, contrary to the spirit and meaning of this chapter, in the power of trustees, by whatever name called; or

(h) To enable or empower any other person than themselves, their proper officers, agents and employees to dictate or control the management of business, contrary to the spirit and meaning of this chapter; or

(i) To unite or pool interest in the importation, manufacture, production, transportation, or price of a commodity, contrary to the spirit and meaning of this statute.

Any corporation, domestic or foreign, or any partnership, or individual, or other association, or person whatsoever, who is now, or shall hereafter create, enter into, become a member of, or a party to any trust or combine as hereinabove defined shall be deemed and adjudged guilty of a conspiracy to defraud and shall be subject to the penalties hereinafter provided. Any persons, association of persons, corporation, or corporations, domestic or foreign, who shall be a party or belong to a trust and combine shall be guilty of crime and upon conviction thereof shall for a first offense be fined in any sum not less than one hundred dollars nor more than five thousand dollars and for a second or subsequent offense not less than two hundred dollars nor more than ten thousand dollars, and may be enjoined by a final decree of the chancery court, in a suit by the state on the relation of the attorney-general, from further prosecution of or doing of the acts constituting the trust and combine as defined in this chapter.

* * * * *

plaint are charges that the state court defendants abused the customers of the state court complainants by threatening them with physical violence, addressing them with obscene and insulting language, destroying their property, and beating and assaulting them.

1089. *Additional contracts or combinations not allowed by law.*

Any corporation, domestic or foreign; or individual, partnership, or association of persons whatsoever, who, with intent to accomplish the results herein prohibited or without such intent, shall accomplish such results to a degree inimical to public welfare, and shall thus:

(a) Restrain or attempt to restrain the freedom of trade or production;

(b) Or shall monopolize or attempt to monopolize the production, control or sale of any commodity, or the prosecution, management or control of any kind, class or description of business;

(c) Or shall engross or forestall or attempt to engross or forestall any commodity;

(d) Or shall destroy or attempt to destroy competition in the manufacture or sale of a commodity, by selling or offering the same for sale at a lower price at one place in the state than another or buying or offering to buy a commodity at a higher price at one place in the state than another, differences of freight and other necessary expenses of sale and delivery considered;

(e) Or shall destroy or attempt to destroy competition by rendering any service or manipulating, handling or storing any commodity for a less price in one locality than in another, the differences in the necessary expenses of carrying on the business considered, shall be deemed and held a trust and combine within the meaning and purpose of this section, and shall be liable to the pains, penalties, fines, forfeitures, judgments, and recoveries denounced against trusts and combines and shall be proceeded against in manner and form herein provided, as in case of other trusts and combines. And it shall be sufficient to make out a prima facie case of a violation of this subdivision of this section to show lower charge for the service therein mentioned in one locality than another, or to show a higher price paid for a commodity in one locality than another, differences of freight and other necessary expenses of operating business considered.

For relief, the state court complainants sought (A) to have "the funds, property and effects of the nonresident defendant NAACP, its branches or auxiliary offices in the State of Mississippi, in the hands of and under the control of the resident (defendant Banks) ... attached" [presumably as a source of damages] and held to await the decrees and orders of the court; (b) to have all the defendants (except the Banks) enjoined from "(1) Picketing in or about the business premises of the complainants, (2) stationing guards at or near the vicinity of the said premises or the complainants; (3) soliciting, advising, threatening, coercing and constraining any person from trading with complainants; (4) interfering with the businesses of the complainants; (5) boycotting the businesses of the complainants; (6) asking or demanding that others cease doing business with the complainants; and (7) committing acts in restraint of trade and/or in violation of the laws of the State of Mississippi thereto appertaining;" and (C) to recover damages in excess of 3.5 million dollars, for which the state court defendants would be held jointly and severally liable.

Shortly after the filing of this State Chancery suit, and without notice or hearing, the Clerk of the Chancery Court for the First Judicial District Court of Hinds County commenced to serve writs of attachment against what was purported to be the funds of the NAACP on deposit in various Banks around Mississippi, ordering the Banks to hold the funds of the NAACP until further notice. The Clerk's action was

taken pursuant to Miss. Code Ann. § 2730 (1942),[3] which authorizes attachment of the property of non-residents without notice or hearing. It turned out, however, that the Banks upon which the writs of attachment were served had frozen not the assets of the non-resident NAACP, which was a named defendant in the state civil action, but rather the assets of the Mississippi State Conference of the NAACP, and of all local NAACP branches in the State of Mississippi, all of which organizations claim *not* to have been named as defendants in the state civil action, and claim further to be residents of the State of Mississippi and therefore not subject to its non-resident attachment statutes.

B. *Proceedings Below; Stage I*

Believing that their constitutional rights to due process of law had been infringed by these attachments, the Mississippi State Conference and the Coahoma

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[3] §2730. *Attachment against non-residents — how effects or indebtedness bound.*

When a bill shall be filed for an attachment of the effects of a non-resident, absent or absconding debtor in the hands of persons in this state, or of the indebtedness of the defendant in this state to such non-resident, absent or absconding debtor, it shall be sufficient to bind such effect or indebtedness, that the summons for the defendant resident in this state shall have stated in or endorsed upon it the nature and object of the suit, and that it is to subject the effects in the hands of the resident defendant, and the indebtedness of such defendant to the non-resident, absent or absconding debtor, to the demand of the complainant; or, instead of such statement on the summons, a copy of the bill may be served with the summons, and shall bind the effects or indebtedness from the time of such service.

Branch of the NAACP, acting individually and on behalf of all other local branches similarly situated, filed a section 1983 action in federal court against the Banks which had frozen their funds pursuant to the writs of attachment. The original complaint in this suit was filed on November 7, 1969, by Aaron Henry, President of both the Mississippi State Conference and the Coahoma Branch. (The parties to the original complaint will be referred to hereinafter as the "original plaintiffs.") The original plaintiffs alleged that although they are authorized by the NAACP, a New York Corporation, to use the words "National Association for the Advancement of Colored People" as part of the title of their respective associations, and have agreed to abide by the constitution of the New York NAACP, they are completely autonomous and independent of the New York NAACP. They alleged further that they were not defendants to the state civil action and had received no notice of the suit, and that they are residents of the State of Mississippi and therefore not subject to its non-resident attachment procedures. Charging that they had been and were being irreparably injured in that all their operational funds, which were used to carry out constitutionally protected activities such as a voter registration drive, had been frozen without notice and hearing, and without even being named in the state civil action, they sought "to enjoin (the) attachment of property belonging to them made without compliance with fundamental constitutional guarantees." The original plaintiffs thus moved for a temporary restraining order and a preliminary injunction. The court below held a hearing on the original plaintiffs' motion for a temporary restraining order

on November 17, 1969, at which one of the defendant Banks appeared and moved to have the state court complainants made parties to the proceeding on grounds that the state court complainants claimed an interest in the contested funds. The court below granted the Banks' motion, as well as the original plaintiffs' motion for a temporary restraining order. The court then set December 1, 1969 for a hearing on the original plaintiffs' motion for a preliminary injunction. At this hearing, the state court complainants appeared and contested the motion. At the conclusion of this hearing, and on the strength of the evidence taken, along with the various pleadings of the parties, the court granted the original plaintiffs' motion for preliminary relief on December 15, 1969, ordering the defendant Banks "to release all funds [of the original plaintiffs] held by them pursuant to the writs of attachment ... upon posting by plaintiffs . . . of a bond in the amount of 110% of [the] funds," and further preliminary enjoining the state court complainants" from subjecting or causing to be subjected in anyway funds of [the original plaintiffs] deposited in the defendant Banks to attachment or other process causing [the original plaintiffs] to be deprived of the use of their funds."

No appeal was taken by either the Banks or the state court complainants from the interlocutory injunction of December 15, 1969.[4] And although it may be within

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[4]At the same time the court below issued its preliminary injunction, it issued a separate order overruling the state court complainants' motion to dismiss the action. *See* Memorandum Opinion in No. DC 69-58-S, at 8 (Appendix, Vol. II, at 195). In the order overruling the motion to dismiss, the court below provided

the scope of our reviewing powers on this appeal to consider the validity of this December 15 interlocutory injunction against the attachments, we decline to do so for several reasons.[5] First, the Banks, against

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that the state court complainants might make application to the Fifth Circuit for an interlocutory appeal from the order, pursuant to 28 U.S.C.A. § 1292(b). The state court complainants did make application to this Court for interlocutory appeal from the district court's order denying their motion to dismiss, and leave to appeal was denied on March 4, 1970. *Claiborne Hardware Co., et al v. Aaron Henry, et al.*, Misc. No. 1583 (March 4, 1970). Although the state court complainants had a *right* to appeal from the denial of the December 15 preliminary injunction pursuant to 28 U.S.C.A. § 1292(a), they chose not to do so, and the time for appealing that order has now lapsed. It is clear that the procedure for taking an appeal from an interlocutory order is precisely the same as that for taking an appeal from a final judgment, and that interlocutory appeals taken pursuant to 28 U.S.C.A. § 1292(a) must be timely filed. *See Dahlen v. Kramer Mach. & Engineering Prod. Co.*, 10th Cir. 1961, 303 F.2d 293; *Stiller v. Squeez-A-Purse Corp.*, 6th Cir. 1958, 251 F.2d 561. *See also* 9 Moore's Federal Practice ¶ 110.21.

[5] Two questions pertaining to the proper scope of our review on this interlocutory appeal present themselves in connection with the December 15, 1969 injunction. First, notwithstanding the failure of both the Banks and the state court complainants to file a timely appeal from the December 15 order, *see* note 4 *supra*, would we have the power to take the matter up in connection with the review of some subsequent appealable order in the case? *See* 9 Moore's *Federal Practice* ¶ 110.21, at 256 (suggesting an affirmative answer); *but cf. Stiller v. Squeez-A-Purse Corp.*, 6th Cir. 1958, 251 F.2d 561 (holding that a party may not circumvent the time requirements for appealing from interlocutory orders by repeatedly moving in the district court to dissolve the interlocutory order, and after repeated orders of denial, appeal from the last order of denial entered in the court, although such an appeal would be untimely if considered as taken from the first order.).

Secondly, if consideration of the first order is not foreclosed by time requirements, would it be within the scope of our review of a subsequent interlocutory order to consider a prior order on our own motion? The general rule governing the scope of review on interlocutory appeals is that "the appellate

whom a major command of the December 15 order runs, are not parties to the present appeal and chose not to appeal the December 15 order when they could have done so.[6] Secondly, the state court complainants, who are the only appellants here, have confined their appeal to questioning the validity of a subsequent interlocutory order of the court entered on June 9, 1970[7]

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court will not go any further . . . than is necessary to decide the matter upon appeal." 9 Moore's *Federal Practice* ¶ 110.25[1], at 269-70. This rule-of-thumb, however, may be only a rule of orderly judicial administration. Once a timely appeal is taken from an order made appealable by statute, some courts have viewed their power to be plenary to the extent they choose to exercise it. *See, e.g., Horwitz v. Directors Guild of America, Inc.*, 2d Cir., 364 F.2d 67, *cert. denied*, 385 U.S. 971, 87 S.Ct. 508 (1966). There is some question, therefore, whether we have the power to consider the December 15 order. Even if our review power on interlocutory appeals is plenary, however, we have decided not to exercise that power in this case for reasons discussed in the text *infra*.

[6] *See* note 4 *supra*. Moreover, the state court complainants' failure to appeal the December 15 order appears to have been deliberate, for at the time they had a right to appeal that order pursuant to 28 U.S.C.A. § 1292(a), they did appeal a separate, certified order of the district court pursuant to 28 U.S.C.A. § 1292(b).

[7] In their notice of appeal the state court complainants appeal only from

> "the interlocutory order of the United States District Court Judge for the Northern District of Mississippi, dated June 9, 1970, preliminary restraining and enjoining, until further order of the district court, the defendant and those persons in active concert and participation with them from prosecuting or causing to be prosecuted that certain action now pending in the Chancery Court of the First Judicial District of Hinds County, State of Mississippi, styled Claiborne Hardware Co., et al v. National Association for the Advancement of Colored People, No. 78, 353 on the docket of said Court, entered in this action on June 10, 1970."

State Court Complainants' Notice of Appeal, Vol. II, Appendix,

(discussed at length hereinafter). Finally, we decline to examine the December 15, 1969 order because we think that an examination of that order would be completely unnecessary to a decision of the questions raised by the June 9 order on which this interlocutory appeal is based.[8] To the extent that we have discussed the December 15 order, we have done so for only two reasons: (1) To set the stage for our discussion of the June 9, 1970 order, and (2) to notify the parties that the December 15 interlocutory injunction against the attachments remains standing,[9] pending a final determination by the district court of the many difficult questions raised by the original plaintiffs' procedural due process claim that all their funds have been illegally attached without notice and hearing, pursuant to a Mississippi non-resident attachment statute, when these plaintiffs are in fact residents of the State of

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at 258-59.

No mention is made of the December 15, 1969, order in the Notice of Appeal, nor have the appellants — state court complainants — briefed whatever questions may be raised by the December 15 order. *See, e.g.*, text accompanying notes 19-20, *infra*.

[8] None of the parties have suggested that the December 15, 1969 order interferes in anyway with the pending state civil action. *Cf. Lynch v. Household Finance Co.*, D. Conn. 1970, 318 F. Supp. 1111, 1115. And, indeed, we have difficulty seeing how it could interfere if the situation is as the original plaintiffs contended — that is, if the organizations against whom the attachments run are not even parties to the pending state suit. *See also* text accompanying notes 19-20, *infra*.

[9] Neither party to this appeal has suggested that the interlocutory injunction of June 9, 1970 (discussed hereinafter) superseded in any way the interlocutory injunction of December 15, 1969, *cf. Dahlen v. Kramer Mach. and Engineering Prod. Co.*, 10th Cir. 1961, 303 F.2d 293, nor does our study of the Record indicate that the December 15, 1969 order has been affected in any way by the subsequent orders of the district court.

Mississippi and not even parties to the state civil suit, the filing of which generated the attachments. *Cf., e.g., Wisconsin v. Constantineau*, ____ U. S. ____, 91 S. Ct. 407 (1971). As we proceed to what really concerns us on this appeal, therefore, we understand that the Banks and the state court complainants are presently preliminarily enjoined from withholding or causing to be withheld, pursuant to writs of attachment issued in connection with Cause No. 78353 in Chancery Court of the First Judicial District of Hinds County, Mississippi, funds belonging to the original plaintiffs deposited in the defendant Banks.

C. *Proceedings Below: Stage II*

Several days following the day on which the district court announced its decision to issue a preliminary injunction restraining the withholding of the original plaintiffs' funds,[10] the plaintiffs took steps which greatly enlarged the scope of the issues in the case. Specifically, the NAACP and MAP, both named defendants in the state complainants' pending antitrust suit, were added as parties to the instant suit, and Aaron Henry, who appeared in the original complaint in his official capacity as President of the State Conference and the Coahoma Branch, but not as an individual, appeared in the amended complaint as an individual representing the class consisting of all indi-

[10]The district court actually announced its decision from the bench at the conclusion of the hearing on December 1, 1969. The order was not formally entered until December 15, 1969, the day the original plaintiffs failed their motion to add the state court defendants to the suit.

viduals named in the State Chancery suit. At this time, the plaintiffs also filed an amended complaint which requested substantially broader relief than originally requested. Generally, the amended complaint sought further relief in the form of (1) an injunction restraining the state court complainants from further prosecuting the pending State Chancery suit, and (2) a declaratory judgment that the anti-trust statutes upon which the state court complainants were relying in the State Chancery suit were unconstitutional on their faces or as applied to the state court defendants.[11]

On December 31, 1969, the original plaintiffs, together with the newly added state court defendants, filed a motion for a preliminary injunction restraining the state court complainants from further prosecuting or causing to be prosecuted the State Chancery action. The state court complainants replied with numerous motions of their own, and all outstanding motions were heard by the district court on February 26, 1970. On June 9, 1970, obviously after careful deliberation, and accompanied by a lengthy and thoughtful memorandum opinion which has been very helpful to this Court, the district court entered its order granting, *inter alia*,[12] the motion for a preliminary injunction restraining the state court complainants from further prosecuting or causing to be prosecuted the State Chancery suit. It is from this order enjoining their pending

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[11] *See* note 2 *supra*.

[12] Numerous other motions were granted or denied in the district court's June 9 order. We consider none of them — only that portion of the order granting the motion for a preliminary injunction.

antitrust suit in State Chancery court that the state court complainants now appeal. First, they challenge the jurisdiction of the district court. They contend that the district court lacked jurisdiction because (a) there is no section 1343(3) question presented in the complaint since the requisite "state action" to a civil rights action cannot be found in the mere filing of a private civil tort action in state court; and (b) there is no section 1331(a) federal question presented in the complaint since the amended complaint contains no more than what the state court defendants' defense would be to the State Chancery suit and the matter in controversy does not exceed $10,000.[13] Secondly, they urge that 28 U.S.C.A. § 2283, the anti-injunction statute, is an absolute bar to enjoining their pending state civil suit. Finally, they argue that "plaintiffs have no absolute right to picket, march and demonstrate." Because we have decided that federal jurisdiction was lacking to support the cause of action alleged in the amended complaint, we do not reach the second and third issues.

II. Jurisdiction

Federal district courts have jurisdiction of actions to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the federal constitution or any Act of Congress providing for the equal rights of citizens. 28 U.S.C.A. § 1343(3) and

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[13] *See* note 15 *infra*.

42 U.S.C.A. § 1983.[14] 1 W. Barron & A. Holtzoff, *Federal Practice and Procedure* ¶ 37 (Wright ed. 1960). It is, of course, essential to this "civil rights" jurisdiction that the deprivation of rights contested be "state action."[15] The difficult problem has always been to

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[14] 28 U.S.C.A. § 1343(3) provides in pertinent part that

> [t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .
>
> (3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privliege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . . .

42 U.S.C.A. § 1983, which is the statute creating a civil rights cause of action cognizable under 28 U.S.C.A. § 1343(3), provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[15] It is likewise essential to federal question jurisdiction under 28 U.S.C.A. § 1331(a) that there be "state action" when the federal question alleged is one "arising under" the Bill of Rights and the Fourteenth Amendment. *See Swift v. Fourth Nat'l Bank*, M.D. Ga. 1962, 205 F. Supp. 563, at 565. *See also Hampton v. City of Jacksonville*, 5th Cir. 1962, 304 F.2d 320, 322; *Smith v. Holiday Inns of America, Inc.*, 6th Cir. 1964, 336 F.2d 630. In the instant case, the state court defendants predicated jurisdiction not only on section 1983 and 28 U.S.C.A. 1343(3), but also on the Bill of Rights as applied to the States by the Fourteenth Amendment. Since "state action" is required for both, however, to decide the jurisdictional issue under 28 U.S.C.A. § 1343(3) is also to decide the jurisdictional issue under 28 U.S.C.A. § 1331(a). The two concepts have long been considered identical. *United States v. Price*, 383 U.S. 787, 86 S.Ct. 1152, at note 7 (1966).

pinpoint the boundary between state action and non-state, or private, action. In this case, we must decide on which side of the boundary lies the mere commencement of a private tort suit in state court.

Relying primarily on *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964) and *Shelly v. Kramer*, 334 U.S. 1, 68 S.Ct. 836 (1948),[16] the district court held that "state action" may be found in the filing of a suit between private parties in state court. Both these decisions, therefore deserve our careful attention. *New York Times* began as a civil suit between private parties in the state courts of Alabama. It resulted in a judgment in the Supreme Court of Alabama against the *Times*. In its opinion on certiorari, the United States Supreme Court devoted only a short paragraph to the problem of judicial involvement in a private lawsuit. It said:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a

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[16]The district court also relied on *Edwards v. Habib*, D.C. Cir. 1968, 397 F.2d 687, *cert. denied*, 393 U.S. 1016, 89 S.Ct. 618 (1969). It is true that *Edwards v. Habib* contains pages of discussion on the problem of "state action." In those pages, Judge Wright discussed many possible theories of resolving "state action" problems, but he rested his decision on none of them. In fact, he concluded that it was not necessary to decide whether there was "state action" in the case, because the case could be decided merely by construing an Act of Congress. As the only concurring judge pointed out, therefore, the dictum on "state action" was nothing more than "constitutional speculation" and for that reason the concurring judge declined to join in that part of the opinion. *See* 397 F.2d at 703. (Concurring opinion of McGowan, J.)

> state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law has been applied in a civil action, and that it is common law only, though supplemented by statute ... The test is not the form in which state power has been applied but, whatever the form, *whether such power has in fact been exercised.*

376 U.S. at 265, 84 S.Ct. at 718 (emphasis added).

Shelly v. Kramer also began as a private civil suit in state court, where one party was seeking judicial enforcement of a racially restrictive covenant in a deed. The courts of Missouri enforced the covenant, and the United States Supreme Court on certiorari held that state enforcement of a private discriminatory contract violates the fourteenth amendment. The clear message of *Shelly v. Kramer* is that it is judicial *enforcement* of a private discriminatory contract that brings the otherwise "private action" within the ambit of the fourteenth amendment. What is common to both *Shelly* and *New York Times*, therefore, that is not present in our case, is that "state action" was found in those cases only *after* a final judgment or otherwise dispositive order[17] on the merits had been rendered by the state court. In contrast to these cases in which

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[17] *See Machesky v. Bizzell*, 5th Cir. 1969, 414 F.2d 283, 286 where the Court suggests that an injunction granted by a state court may constitute "state action."

some dispositive action has been taken by a court, there is a long line of cases which conclude that a state, by merely holding its courts open to litigation of complaints, does not clothe the persons who use its judicial processes with the authority of the state. *See Skolnick v. Martin*, 7th Cir., 317 F.2d 855, *cert. denied*, 375 U.S. 908, 84 S.Ct. 199 (1963); *Skolnick v. Spolar*, 7th Cir., 317 F.2d 857, *cert. denied*, 375 U.S. 904, 84 S.Ct. 195 (1963); *Moffett v. Commerce Trust Co.*, 8th Cir., 187 F.2d 242, *cert. denied*, 342 U.S. 718, 72 S.Ct. 32 (1951); *Campo v. Niemeyer*, 7th Cir. 1950, 182 F.2d 115; *Swift v. Fourth Nat'l Bank*, M.D. Ga. 1962, 205 F. Supp. 563; *Bottone v. Lindsley*, 10th Cir. 1948, 170 F.2d 705, *cert. denied*, 336 U.S. 944, 69 S.Ct. 810 (1949). *See also Jones v. Jones*, 7th Cir. 1969, 410 F.2d 365, *cert. denied*, 396 U.S. 1013, 90 S.Ct. 547 (1970); *Rhodes v. Meyer*, 8th Cir., 334 F.2d 709, *cert. denied*, 379 U.S. 915, 85 S.Ct. 263 (1964); *Sarelas v. Porikos*, 7th Cir. 1963, 320 F.2d 827; *Wardrop v. Ross*, W.D. Pa. 1970, 319 F. Supp. 1299; *Drexler v. Walters*, D. Minn. 1968, 290 F. Supp. 150; and *Pritt v. Johnson*, M.D. Pa. 1967, 264 F. Supp. 167 (holding that attorneys who participate in litigation are not acting under color of state law within the civil rights statute). The leading case on this question, which presents a fact pattern very similar to the case at hand, seems to be *Stevens v. Frick*, 2d Cir., 372 F.2d 378, *cert. denied*, 387 U.S. 920, 87 S.Ct. 2034 (1967). *Stevens* was an action to enjoin the defendant from further prosecuting a pending civil suit for libel in the Pennsylvania courts on grounds that the mere filing and pendency of the suit "chilled" the plaintiffs' first amendment rights. Like the plaintiffs herein, the plaintiffs in *Stevens* relied on *Shelly*

v. Kramer to support civil rights jurisdiction in the case. The Second Circuit rejected this argument and, distinguishing *Shelly*, stated the following:

> By contrast (with *Shelly v. Kramer*), in this case no order or judgment has been entered under which the power of the state is invoked to suppress the Stevens book, nor is there any Pennsylvania statute or case which authorizes the imposition of unconstitutional restraints on freedom of the press .... Thus far Pennsylvania has merely provided a forum to determine the rights of the parties. Both logic and precedent suggest that *merely by holding its courts open to litigation of complaints, regardless of how baseless they eventually prove to be, Pennsylvania does not clothe persons who use its judicial processes with the authority of the state* ....

372 F.2d at 381 (emphasis added). The court concluded therefore that Stevens did not have a claim cognizable under the Civil Rights Act.

The reason for the principles enunciated in the above-cited cases is manifest: Judicial bodies are supposed to be neutral; perhaps their most magnificent feature is their accessibility to all claimants, no matter how unfounded those claimants' contentions may turn out to be. To say that an open courthouse door constitutes "state action" is to assume that the party whose private suit is challenged as "state action" already has the court on his side before the adjudicatory

process even commences. The essence of "state action," as defined in *Burton v. Wilmingtom Parking Authority,* 365 U.S. 715, 81 S.Ct. 856 (1961), is action in which the "[s]tate has so far insinuated itself into a position of interdependence [with the otherwise "private" person whose conduct is said to violate the fourteenth amendment] . . . that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall within the scope of the Fourteenth Amendment." 365 U.S. at 725, 81 S.Ct. at 862. To apply this test to the mere filing of a private civil complaint in a state court and conclude that "state action" results would be to demean the judicial process. It would be to forget that a court is an open forum before which each party is to have a full and fair opportunity to make his case. Only after both parties to a private civil action here had their day in court and the court has reached its decision and rendered its judgment does the full power of the state come into play in enforcing the judgment. We need only look at the status of the pending civil suit in the instant case to demonstrate this principle. As things stood at the time the court below issued its preliminary injunction, there were no indications what, if any, evidence the state court complainants would be able to produce to support their various allegations of violent and abusive conduct, nor were there any indications whether the state court complainants would be able to substantiate their claimed loss of 3.5 million dollars. Thus, from a factual standpoint, it was entirely uncertain whether the state court complainants would even be

able to carry their burden of proof in the case. From the standpoint of the legal questions presented, the state court complainants were proceeding to court armed with state antitrust statutes which, from all appearances, no Mississippi court has ever applied in a noncommercial situation. The state court defendants, on the other hand, no doubt would have armed themselves with the First Amendment to the United States Constitution and numerous Supreme Court opinions holding that their right to picket peacefully is constitutionally protected. At the time the court below issued its injunction, the Mississippi Chancery court had made no dispositive determinations, factual or legal, on any of these difficult issues. In other words, the State, through its courts, had taken a stand on neither side of this very difficult controversy.

The effect of the relief the state court defendants seek in this Court, through their argument that the state court complainants' use of the Mississippi courts constitutes "state action," would be to shut the doors of the Mississippi courts to its citizens before those citizens have an opportunity to present their case. For us to take such a step, the situation must be drastic indeed. We are asked to take the step, however, on grounds that the state complainants' suit is unfounded and that its mere pendency chills the state court defendants' first amendment freedoms. *But see Younger v. Harris*, ___ U.S. ___, at ___, 91 S.Ct. 746, at 754 (1971). Remedies exist in our system of justice for unfounded suits in the common law actions for malicious

prosecution and abuse of process.[18] And it is through the faithful enforcement of these remedies, rather than through denying access to the courts in the first instance, that, for the most part, the menace of bad faith private litigation should be controlled. The state defendants argue, however, that the "state action" needed to support their amended complaint attacking the state court complainants' antitrust suit can be found in the aforementioned prejudgment attachments of funds belonging to the various original plaintiffs. They rely heavily on the recent Supreme Court decision in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820 (1971). *Sniadach* involved the constitutionality of a Wisconsin prejudgment garnishment procedure. The debtor's wages in that case were garnished. She moved in state court that the garnishment proceedings be dismissed for failure to satisfy the due process requirements of the Fourteenth Amendment, and the Supreme Court of Wisconsin sustained the lower court in approving the procedure. The United States Supreme Court reversed, holding that the procedure violated the due process requirements of the Fourteenth Amendment. Although the Court did not address itself to the question whether "state action" was present in the garnishment procedure, implicit in its holding that the procedure violated the Fourteenth Amendment is the conclusion that "state action" was present, since "state action" is required to invoke the protection of the Fourteenth Amendment. *See Hall v. Garson,*

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[18] Mississippi jurisprudence recognizes a cause of action for abuse of process or malicious prosecution. *Allen v. Ritter*, 235 So.2d 253 (1970); *Wutzke v. Wayne Lee's Grocery and Market, Inc.*, 199 So.2d 438 (1967); *Kitchens v. Barlow*, 164 So. 2d 745 (1964).

5th Cir. 1970, 430 F.2d 430, 439-40. Of course, as we have made clear at the outset of this opinion, neither the validity of the attachments below nor the validity of the December 15 preliminary injunction against them is presented to us on this appeal. It is not necessary, therefore, for us to say whether, *taken alone*, involved "state action" for federal jurisdictional purposes. But even assuming for the moment that "state action" was involved in the attachments, we do not think it can be fairly said that such "state action" extends to the entire underlying private antitrust suit.

The very nature of the garnishments attacked in *Sniadach*, and of the attachments attacked here, makes it clear that these ministerial acts should be treated as separate matters from the suits underlying them. This much is indicated in the following language from *Sniadach*, describing the procedure under attack in that case:

> What happens in Wisconsin is that the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby wages are frozen. *They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard* and to tender any defense he may have, whether it be fraud or otherwise.

395 U.S. at 338-39, 89 S.Ct. at 1821 (emphasis added). The administrative acts complained of in *Sniadach*, and, it may be argued, in the attachments below, had an indisputable aspect of finality wherein the full authority of the State was brought to bear on the complaining party.[19] But obviously this does not mean that there was any finality or any "state action" about the still pending "main suit" (as it was referred to in *Sniadach*), or "underlying suit" (as we shall call the state court complainants' antitrust suit here). Thus, to say that the "state action" contained in a summary garnishment, such as that in *Sniadach*, or that may be contained in a prejudgment attachment, such as that below, clothes the entire underlying suit in the garb of "state action" when no evidence has been presented in the underlying suit and no decision on the merits reached, is to sweep too broadly. Most of the time, the prejudgment procedure bears no meaningful relation to the underlying suit; it is true that the institution of the underlying suit triggers the prejudgment procedure, but that is as far as the relationship goes. Thereafter, the prejudgment procedure takes place regardless of the merits or substantive content of the underlying suit. In reality the prejudgment procedure

[19] As a general rule, of course, the ministerial acts of a court's officers, who in the performance of their official responsibilities issue process and levy execution, are not considered to be action under color of state law. *Dinwiddie v. Brown*, 5th Cir., 230 F.2d 465, *cert. denied*, 351 U.S. 971, 76 S.Ct. 1041 (1956); *Schatte v. International Alliance*, 9th Cir., 182 F.2d 158, *cert. denied*, 340 U.S. 827, 71 S.Ct. 64 (1950). *See also Hanna v. Home Insurance Co.*, 5th Cir. 1960, 281 F.2d 298, *cert. denied*, 365 U.S. 838, 81 S.Ct. 751 (1961). The distinction between these cases and the *Sniadach*-type case can be found, we think, in the *effect* of the particular administrative act in question.

is usually a separate matter, and clearly courts should be capable of treating it separately. Certainly, in the instant case, the prejudgment attachments should be viewed separately from the underlying suit predicated on the Mississippi antitrust laws. Under the Mississippi non-resident attachment statute, the writs would have issued regardless of what the underlying suit involved. As the state court defendants pointed out in their brief in this Court, under the Mississippi non-resident attachment procedure, the complaining party has complete control over whether a prejudgment attachment is made; all the statute requires is that the complaining party state the nature and object of his suit on the summons, and the Clerk will then serve the writs regardless of the merits of the complaining party's underlying suit. Moreover, in the instant proceedings the parties themselves consistently have treated the attachments as a separate matter from the suit. And justifiably so, for, as we pointed out earlier, the attachments run against persons who allegedly *were not even parties* to the state "antitrust" suit. It must be remembered that the original plaintiffs below sought and obtained injunctive relief first against *only* the attachments on the strength, in part, of their contentions that they *were* residents and were *not* parties to the pending state suit. And the issuance of the injunction against the attachments apparently interfered in no way with the prosecution of the pending civil suit, for the state court defendants thereafter found it necessary to enter the instant proceeding and seek the much broader relief of an injunction against the pending state suit itself. *Cf. Lynch v. Household Finance Corp.*, D. Conn. 1970, 318 F. Supp. 1111, 1115. Finally, on this

appeal the state court complainants have not appealed from the order enjoining the attachments, while they have appealed from the order enjoining the pending, underlying suit. What we are saying, therefore, is that the "state action" which may be found in ministerial acts performed in connection with a prejudgment attachment does not necessarily extend to the otherwise wholly private action of *a still undecided* underlying pending civil suit;[20] on the facts of this case, it most certainly does not.

Since we conclude that there is no "state action" to be found in the mere filing of a private civil tort action in state court, the district court's order of June 9, 1970, enjoining the prosecution of the pending state civil action should be vacated and the cause remanded with instructions to dismiss the amended complaint for lack of jurisdiction.

VACATED and REMANDED with directions.

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[20] *See* notes 4-9, *supra*, and accompanying text.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30295

AARON HENRY, ET AL,
Plaintiffs-Appellees,

versus

FIRST NATIONAL BANK OF CLARKSDALE, ET AL,
Defendants,

CLAIBORNE HARDWARE COMPANY, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Mississippi

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 23, 1971, 5 Cir., 1971, ___ F.2d ___).

(September 16, 1971)

Before RIVES, THORNBERRY and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearingu En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30295

D. C. Docket No. DC 69-58-S

AARON HENRY, ET AL,
Plaintiffs-Appellees,
versus

FIRST NATIONAL BANK OF CLARKSDALE, ET AL,
Defendants,
CLAIBORNE HARDWARE COMPANY, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Mississippi

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Before RIVES, THORNBERRY and CLARK,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

June 23, 1971

Supreme Court, U. S.
FILED
MAR 14 1972
MICHAEL RODAK, JR., CLERK

NO. 71-605

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

AARON HENRY, ET AL. Petitioners

v.

CLAIBORNE HARDWARE CO., ET AL. Respondents

SUPPLEMENTAL APPENDIX TO RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

CLAIBORNE HARDWARE COMPANY, ET AL. — Complainants

VS. — No. 78,353

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL — Defendants

BILL OF COMPLAINT

Come the complainants: Claiborne Hardware Company; Q. H. McDaniel, Jr., doing business as McDaniel Pharmacy; James E. Hudson, George A. Hudson, and H. B. Hudson, Jr., doing business as Hudson Bros., trading as Piggly Wiggly Store and Hudson's Gift Shop; Waddy Abraham, doing business as Jitney Jungle; Louis N. Ellis, Executor of the Will and Estate of Michael Ellis, Deceased; Joe Ellis, Mrs. Ben Mullen and Miss Ella Mae Ellis, doing business as George Ellis Food Store; Louis N. Ellis, doing business as Abe's Betty Jean and Port Gibson Trading Co.; H. D. Harwell, doing business as Mack's Package Store; Norman N. Ellis and Barbara B. Ellis, doing business as Ellis Variety Store; W. H. Hay, doing business as O. K. Cleaners and Shirt Laundry; Murad Nasif and Mildred Nasif, doing business as M & M Super Store & Washateria; Port Gibson Lumber & Supply Co., Inc.; Charles R. Dobbs, doing business as Western Auto Associate Store; Kelly D. Conn, doing business as Auto-Lee Associate Store No. 225; A & P Service and Parts, Inc.; Allen Motor Co., Inc.; Donald-Segrest Ford, Inc.; and Mrs. Edgar A. McCaa, doing business as Town and Country; and

file this their bill of complaint against the defendants, National Association for the Advancement of Colored People, Mississippi Action for Progress, Inc., Ferd Allen, Ike Allison, Henry Anderson, Alonzo Atlas, Beatrice Atlas, Calvin Bailey, James Bailey, McLawrence Bailey, Joseph M. Barber, Kenneth C. Barber, Bill Beasley, Helen Beasley, Calvin Blackburn, Ed Brandon, Marjorie W. Brandon, Maxie Brandon, Eli Brooks, Priscilla Brooks, Janie Brown, Tullos Brown, Eddie Burrell, James Burrell, Robert Butler, Jr., Arthur Lee Camphor, Imra Rae Camphor, W. E. Camphor, Rev. Dominic Cangemi, Maggie Clark, Alberta Coleman, Ed Coleman, Charles Collier, James Collier, Alexander Collins, Geneva Collins, Scott Crowder, Thelma Crowder, Dan Currie, Sarah Jane Curry, Charles Davis, Mack Louis Davis, Mary Ella Dee, James Devaul, Alex Dorsey, Salley Dorsey, Geneva Durham, Johnny Durham, Mary Durham, John Eggleston, Harvey Ellis, Jim Ellis, Jr., John Ellis, Katie Ellis, Rachel Ellis, Charles Evers, Ethel Graise, James Gray, Walter L. Griffin, Sr., Bernard Gusta, Leesco Gusta, Charlie Harris, Cline Harvey, Aaron Henry, Jim Holt, Henry Hyder, Albert Jackson, Willie Jackson, Mrs. E. J. Jennings, Jessie Johnson, Roscoe Johnson, Jim Jones, Julia Coleman Jones, Lela Jones, Marcus Jones, Nathaniel H. Jones, Samuel Jones, Jr., Bobby Kelly, Bernice Lee, Edward Lee, Margaret Liggan, Horace Lightfoot, Teddy Lipscomb, Clarence Lucas, Julia Lucas, James Mallory, Nathaniel Martin, Leander Monroe, Johnnie Moore, Mary Lee Moore, Willie V. Moore, Ellis Neal, Bessie Newman, D. A. Newman, Amos Newsome, Jr., Carrence Newsome, James Odom, Leona Owens, Roosevelt Owens, William Owens, Henry Patton, Jr., Henry Otis Preston, Evans Robinson, Viola Robinson, William (Willie) Robinson, Floyd Rollins, Mary Ross, Odessa Ross,

William M. (Matt) Ross, Elmo Scott, Rudolph Shields, Oliver Shinall, Dora Shorter, Roman Shorter, Rosa Shorter, Annie B. Smith, Bilbo Smith, Delores Smith, Jim Smith, Addie Speed, Laurance Speed, Leon Tarleton, Ira Thomas, Carl Thompson, Jr., Margarite Thompson, (Rev.) Mack Tisdale, Milton Trevillion, George Henry Walker, Thelma K. Walker, Eddie Walls, Jr., Dessie Mae Walls, Alex Warner, Alonoz Warner, Ethel Warner, Albert Weathers, Bome Wells, Carl Lee Wells, Eddie Lee Wells, Katie Wells, James Whitney, Calvin Williams, Ernestine Williams, Aaron Wilson, Gussie Pearl Wilson, Rev. Willie Wilson, Early Wren, Ruby Wren, Arthur Wyatt; and Deposit Guaranty National Bank, First National Bank, Citizens National Bank, and Mississippi Bank & Trust Company, Jackson, Mississippi; and Bank of Clarksdale, Coahoma National Bank, and The First National Bank of Clarksdale, Clarksdale, Mississippi; and Mississippi Southern Bank, and Port Gibson Bank, Port Gibson, Mississippi; and The Jefferson County Bank, Fayette, Mississippi; and The First National Bank, Commercial National Bank, and Greenville Bank, Greenville, Mississippi; and First National Bank of Vicksburg, and Merchants National Bank, Vicksburg, Mississippi; and Hancock Bank, and Gulf National Bank, and Merchants Bank & Trust Company, Gulfport, Mississippi; and First National Bank of Biloxi, and the Peoples Bank of Biloxi, Biloxi, Mississippi; and Britton & Koontz First National Bank, and City Bank and Trust Company, Natchez, Mississippi; and Bank of Mississippi, First Citizens National Bank, and The Peoples Bank & Trust Co., Tupelo, Mississippi; and Commercial Bank, Woodville, Mississippi; and Bank of Prentiss, Prentiss, Mississippi; and Indianola Bank, and Peoples Bank of Indianola, Indianola, Mississippi; and Bank of Commerce, The Bank of

Greenwood, and Leflore Bank and Trust Company, Greenwood, Mississippi; and Citizens National Bank, and Guaranty Bank & Trust Company, Belzoni, Mississippi; and Bank of Holly Springs, First State Bank, and Merchants and Farmers Bank, Holly Springs, Mississippi; and Bank of Cleveland, The Cleveland State Bank and First National Bank of Bolivar County, Cleveland, Mississippi; and Citizens Bank of Hattiesburg, First National Bank of Hattiesburg, and Southern National Bank, Hattiesburg, Mississippi; and The Commercial National Bank and Trust Company and The First National Bank of Laurel, Laurel, Mississippi; and The Citizens National Bank of Meridian, First National Bank of Meridian, and Merchants & Farmers Bank, Meridian, Mississippi; and Grenada Bank and Grenada Trust & Banking Company, Grenada, Mississippi; and The Bank of West Point, and The First National Bank, West Point, Mississippi; and First Columbus National Bank, Merchants & Farmers Bank, and National Bank of Commerce, Columbus, Mississippi; and complainants would with respect show unto the Court the following:

I.

The jurisdiction of the Chancery Court is predicated upon the following:

1. The Constitution and laws of the State of Mississippi pertaining to chancery and equity jurisdiction.

2. The Mississippi chancery practice and procedure which have become established as belonging within equity jurisdiction.

3. That this is a suit to prevent a multiplicity of suits at law.

4. That this is a suit for attachment against a non-resident defendant and resident defendants who have in

their hands effects of, or are indebted to such non-resident defendant.

5. That this is a suit for injunction.

6. That the complainants have no plain, adequate and complete remedy at law.

7. That this is a suit to enforce the substantive equities of the complainants.

8. That this is a suit to afford the complainants relief for rights which are being withheld; and to redress wrongs done to the complainants, and those which are impendingly threatened to be done, and those wrongs which are continuing to be done.

9. That this is a suit to secure for complainants adequate and proper compensation because of the wrongs of the defendants, acting in combination, concert, individually and jointly and severally for: (1) Conspiracy, (2) Boycott, (3) Interference, and (4) Restraint of trade.

II.

The complainants all have their residence and domicile in the State of Mississippi, and are named as follows:

1. Claiborne Hardware Company is a corporation existing under and by virtue of the Constitution and laws of the State of Mississippi, having its domicile and principal place of business in the City of Port Gibson, Claiborne County, Mississippi, where at all times material hereto and for many years prior to the filing of this action said corporation was and is engaged in retail hardware business.

2. Q. H. McDaniel, Jr., is an adult resident citizen of the City of Port Gibson, Claiborne County, Mississippi.

For many years prior to the 4th day of October, 1969, said complainant owned and operated a pharmacy and drug store business under the name of McDaniel Pharmacy in the City of Port Gibson, Mississippi. On said date said complainant was forced to cease and close said business for the reasons hereinafter set forth.

3. James E. Hudson and George A. Hudson are adult resident citizens of Claiborne County, Mississippi; and H. B. Hudson, Jr., is an adult resident citizen of the City of Port Gibson, Claiborne County, Mississippi, where at all times material hereto and for many years prior to the filing of this action said complainants were and are engaged in business, as follows: For many years, ending December 31, 1966, said complainants were engaged in business as a partnership under the name of Hudson Bros. Partners, trading as Piggly Wiggly Store and Hudson's Gift Shop. On January 1, 1967, said businesses were separated and from and after said date have been and are owned and operated as follows: James E. Hudson and George A. Hudson, doing business as Hudson Bros., Partners, trading as Piggly Wiggly Store, at 505 Main Street, Port Gibson, Mississippi; and H. B. Hudson, Jr., owner of and doing business as Hudson's Gift Shop, at 725 Main Street, Port Gibson, Mississippi. Said Piggly Wiggly Store has been, and is, a retail food and grocery store business. Said Hudson's Gift Shop has been, and is, a retail store engaged in the sale of jewelry and other items usual to the gift trade.

4. Waddy Abraham is an adult resident citizen of the City of Port Gibson, Claiborne County, Mississippi. Said complainant is the owner of and is doing business as Jitney Jungle, in the City of Port Gibson, Mississippi, where at all times material hereto and for many years prior to the filing of this action said complainant was,

and is, engaged in the general retail food and grocery store business, under said trade name.

5. Louis Nader Ellis, is Executor of the Will and Estate of Michael Ellis, Deceased, which said estate is presently in administration in the Chancery Court of Claiborne County, Mississippi. For many years prior to the filing of this action and until his death on or about December 18, 1968, said Michael Ellis was the owner of and carried on business under the trade name of Michael Ellis Department Store, a retail merchandise and department store business, and Trace Theater, a motion picture theater business, and owned and managed certain rental properties, all in the City of Port Gibson, Claiborne County, Mississippi. Said businesses and properties which said decedent owned at his death, are now in the possession of and under the control of the complainant, Louis Nader Ellis, Executor of the Will and Estate of Michael Ellis, Deceased, and said complainant is charged with the duty of marshalling and preserving the assets and property of said estate. Said complainant joins in this action, pursuant to the authority and provisions of Sections 608 and 609, Mississippi Code of 1942, Vol. 1A Recompiled.

6. Joe Ellis, Mrs. Ben Mullen and Miss Ella Mae Ellis are all adult resident citizens of the City of Port Gibson, Claiborne County. Said complainants are partners, doing business as George Ellis Food Store, in the City of Port Gibson, Mississippi, where at all times material hereto and for many years prior to the filing of this action said complainants were, and are, engaged in the retail grocery store business.

7. Louis N. Ellis, individually, is an adult resident citizen of the City of Port Gibson, Claiborne County, Mississippi, where at all times material hereto and for

many years prior to the filing of this action said complainant was and is engaged in the retail general merchandise business. Said complainant owned and did business as Abe's Betty Jean for a period of ten years prior to December 31, 1966, when he was forced to cease and close said business, for the reasons hereinafter set forth; and for many years prior to the filing of this action was and is the owner of and doing business as Port Gibson Trading Co. and engaged in the general retail merchandise business.

8. H. D. Harwell is an adult resident citizen of Jefferson County, Mississippi. Said complainant is the owner of, and is doing business as Mack's Package Store in the City of Port Gibson, Claiborne County, Mississippi; where since on or about February 14, 1969, said complainant has been, and is, engaged in the retail sale of alcoholic beverages.

9. Norman N. Ellis and Mrs. Barbara B. Ellis are now residing in the City of Jackson, First Judicial District of Hinds County, Mississippi. At all times material hereto and for many years prior to the filing of this action and until on or about May 14, 1969, said complainants were adult resident citizens of the City of Port Gibson, Mississippi, and were the owners of and carried on a general retail merchandise business under the trade name of Ellis Variety Store, at 607 Market Street, in the City of Port Gibson, Mississippi. On or about said date said complainants were forced to cease and close said business for the reasons hereinafter set forth.

10. W. H. Hay is an adult resident citizen of Claiborne County, Mississippi. Said complainant is the owner of and is doing business as O. K. Cleaners and Shirt Laundry, in the City of Port Gibson, Mississippi, where at all times material hereto and for many years prior to

the filing of said action said complainant was, and is, engaged in the laundry and dry cleaning business.

11. Murad Nasif and Mrs. Mildred Nasif are adult resident citizens of Claiborne County, Mississippi. Said complainants are the owners of and are doing business as M & M Super Store and Washateria, in the City of Port Gibson, Mississippi, where at all times material hereto and for many years prior to the filing of this action, said complainants were, and are, engaged in the retail food and grocery business and the washateria business.

12. Port Gibson Lumber & Supply Co., Inc., is a corporation organized and existing under and by virtue of the Constitution and laws of the State of Mississippi, having its domicile and principal place of business in the City of Port Gibson, Claiborne County, Mississippi, where at all times material hereto and for many years prior to the filing of this action, said corporation was, and is, engaged in the retail business for sales of building supplies, including lumber, hardware and accessories, and in connection with the operation of said business extended credit to retail customers and financing to contractors.

13. Charles R. Dobbs is an adult resident citizen of the City of Port Gibson, Claiborne County, Mississippi. Said complainant is the owner of and is doing business as Western Auto Associate Store, in the City of Port Gibson, Mississippi, where at all times material hereto and for many years prior to the filing of this action said complainant was, and is, engaged in the retail automotive supplies and accessories business.

14. Kelly S. Conn is an adult resident citizen of the City of Port Gibson, Claiborne County, Mississippi.

Said complainant is the owner of, and is doing business as, Auto-Lee Associate Store No. 225, in the City of Port Gibson, Mississippi, where at all times material hereto, and for many years prior to the filing of this action, he was, and is, engaged in the retail sale of automobile parts and supplies.

15. A & P Service & Parts, Inc., is a corporation organized and existing under and by virtue of the Constitution and laws of the State of Mississippi, having its domicile and principal place of business north of the City of Port Gibson, on Highway 18 in Claiborne County, Mississippi. At all times material hereto and for many years prior to the filing of this action said corporation was, and is, engaged in the service station business in the retail sales of gasoline, oil, tires, batteries and accessories, and in servicing motor vehicles.

16. Allen Motor Company, Inc., is a corporation organized and existing under and by virtue of the Constitution and laws of the State of Mississippi, having its domicile and principal place of business in the City of Port Gibson, Claiborne County, Mississippi. At all times material hereto and for many years prior to the filing of this action said corporation was, and is, engaged in the retail sales of new and used automobiles, trucks, outboard motors, and automotive equipment and supplies.

17. Donald-Segrest Ford, Inc., is a corporation organized and existing under and by virtue of the Constitution and laws of the State of Mississippi, having its domicile and principal place of business on U. S. Highway 61 North, Port Gibson, Claiborne County, Mississippi. At all times material hereto and for many years prior to the filing of this action said corporation was, and is, engaged in the retail sales of automobiles and trucks and automotive equipment and supplies.

18. Mrs. Edgar A. McCaa is an adult resident citizen of Claiborne County, Mississippi. For many years prior to the 31st day of January, 1967, said complainant owned and operated a retail clothing and ready-to-wear business under the trade name of Town and Country, in the City of Port Gibson, Mississippi. On said date said complainant was forced to cease and close her said business for the reasons hereinafter set forth.

III.

The defendants are as follows:

1. The non-resident defendant is the National Association for the Advancement of Colored People, hereinafter referred to as NAACP. The defendant NAACP is a corporation, organized and existing under and by virtue of the laws of the State of New York, pursuant to and in conformity with the Acts of the Legislature of the State of New York relating to membership corporations, having its principal office and center of operations in the Borough of Manhattan, in the City, County and State of New York, and having branch or auxiliary offices elsewhere in the United States for the purpose of carrying on the work of the corporation. Said defendant NAACP is a foreign corporation which is duly registered and authorized to transact business and carry on the work of the corporation in the State of Mississippi; and the duly registered, resident agent of said defendant, foreign corporation upon whom service of process may be had upon said NAACP in this action is Jack H. Young, whose post office address is No. 115½ North Farish Street, in the City of Jackson, First Judicial District of Hinds County, Mississippi.

Said complainant is the owner of, and is doing business as, Auto-Lec Associate Store No. 225, in the City of Port Gibson, Mississippi, where at all times material hereto, and for many years prior to the filing of this action, he was, and is, engaged in the retail sale of automobile parts and supplies.

15. A & P Service & Parts, Inc., is a corporation organized and existing under and by virtue of the Constitution and laws of the State of Mississippi, having its domicile and principal place of business north of the City of Port Gibson, on Highway 18 in Claiborne County, Mississippi. At all times material hereto and for many years prior to the filing of this action said corporation was, and is, engaged in the service station business in the retail sales of gasoline, oil, tires, batteries and accessories, and in servicing motor vehicles.

16. Allen Motor Company, Inc., is a corporation organized and existing under and by virtue of the Constitution and laws of the State of Mississippi, having its domicile and principal place of business in the City of Port Gibson, Claiborne County, Mississippi. At all times material hereto and for many years prior to the filing of this action said corporation was, and is, engaged in the retail sales of new and used automobiles, trucks, outboard motors, and automotive equipment and supplies.

17. Donald-Segrest Ford, Inc., is a corporation organized and existing under and by virtue of the Constitution and laws of the State of Mississippi, having its domicile and principal place of business on U. S. Highway 61 North, Port Gibson, Claiborne County, Mississippi. At all times material hereto and for many years prior to the filing of this action said corporation was, and is, engaged in the retail sales of automobiles and trucks and automotive equipment and supplies.

18. Mrs. Edgar A. McCaa is an adult resident citizen of Claiborne County, Mississippi. For many years prior to the 31st day of January, 1967, said complainant owned and operated a retail clothing and ready-to-wear business under the trade name of Town and Country, in the City of Port Gibson, Mississippi. On said date said complainant was forced to cease and close her said business for the reasons hereinafter set forth.

III.

The defendants are as follows:

1. The non-resident defendant is the National Association for the Advancement of Colored People, hereinafter referred to as NAACP. The defendant NAACP is a corporation organized and existing under and by virtue of the laws of the State of New York, pursuant to and in conformity with the Acts of the Legislature of the State of New York relating to membership corporations, having its principal office and center of operations in the Borough of Manhattan, in the City, County and State of New York, and having branch or auxiliary offices elsewhere in the United States for the purpose of carrying on the work of the corporation. Said defendant NAACP is a foreign corporation which is duly registered and authorized to transact business and carry on the work of the corporation in the State of Mississippi; and the duly registered resident agent of said defendant foreign corporation upon whom service of process may be had upon said NAACP in this action is Jack H. Young, whose post office address is No. 115½ North Farish Street, in the City of Jackson, First Judicial District of Hinds County, Mississippi.

2. The resident defendants are:

a. Mississippi Action for Progress, Inc., hereinafter referred to as MAP. Said defendant MAP is a non-profit corporation, organized and existing under and by virtue of the Constitution and laws of the State of Mississippi, having its domicile in the City of Jackson, First Judicial District of Hinds County, Mississippi, where it maintains an office at Room 290, Milner Building, 210 South Lamar Street, in charge of an officer of said corporation, who is Dr. Aaron Shirley, Executive Director, or Matthew Thomas, Deputy Executive Director. Said defendant MAP has failed to designate and appoint a resident agent for service of process as provided by Section 5319, Mississippi Code of 1942, as amended, and pursuant to said statute service of process may be had upon said defendant MAP by service thereof upon the said Dr. Aaron Shirley, Executive Director, or the said Matthew Thomas, Deputy Executive Director.

b. Each of the individual defendants named in this subparagraph is an adult resident citizen of Claiborne County, Mississippi; and each of said individual defendants was and is working in concert with and under the direction of the agents, officers, officials, servants and employees of said defendants NAACP and MAP at all times material to and mentioned in this bill of complaint; and each of said individual defendants may be served with process in the County of Claiborne and/or in the City of Port Gibson; and said individual defendants are named as follows: Ike Allison, Henry Anderson, Alonzo Atlas, Beatrice Atlas, Calvin Bailey, James Bailey, McLawrence Bailey, Joseph M. Barber, Kenneth C. Barber, Bill Beasley, Helen Beasley, Calvin Blackburn, Ed Brandon, Marjorie W. Brandon, Maxie Brandon, Eli Brooks, Priscilla Brooks, Janie Brown,

Tullos Brown, Eddie Burrell, James Burrell, Robert Butler, Jr., Arthur Lee Camphor, Imra Rae Camphor, W. E. Camphor, Rev. Dominic Cangemi, Maggie Clark, Alberta Coleman, Ed Coleman, Charles Collier, James Collier, Alexander Collins, Geneva Collins, Scott Crowder, Thelma Crowder, Dan Currie, Sarah Jane Curry, Charles Davis, Mack Louis Davis, Mary Ella Dee, James Devaul, Alex Dorsey, Sally Dorsey, Geneva Durham, Johnny Durham, Mary Durham, John Eggleston, Harvey Ellis, Jim Ellis, Jr., John Ellis, Katie Ellis, Rachel Ellis, Ethel Graise, James Gray, Walter L. Griffin, Sr., Bernard Gusta, Leeseo Gusta, Charlie Harris, Cline Harvey, Jim Holt, Henry Hyder, Albert Jackson, Willie Jackson, Mrs. E. J. Jennings, Jessie Johnson, Roscoe Johnson, Jim Jones, Julia Coleman Jones, Lela Jones, Marcus Jones, Nathaniel H. Jones, Samuel Jones, Jr., Bobby Kelly, Bernice Lee, Edward Lee, Margaret Liggan, Horace Lightfoot, Teddy Lipscomb, Clarence Lucas, Julia Lucas, James Mallory, Nathaniel Martin, Leander Monroe, Johnnie Moore, Mary Lee Moore, Willie V. Moore, Ellis Neal, Bessie Newman, D. A. Newman, Amos Newsome, Carrence Newsome, James Odom, Leona Owens, Roosevelt Owens, William Owens, Henry Patton, Jr., Henry Otis Presto, Evans Robinson, Mary Robinson, Viola Robinson, William (Willie) Robinson, Floyd Rollins, Mary Ross, Odessa Ross, William M. (Matt) Ross, Elmo Scott, Oliver Shinall, Dora Shorter, Roman Shorter, Rosa Shorter, Annie B. Smith, Bilbo Smith, Delores Smith, Jim Smith, Addie Speed, Laurance Speed, Leon Tarleton, Ira Thomas, Carl Thompson, Jr., Margarite Thompson, (Rev.) Mack Tisdale, Milton Trevillion, George Henry Walker, Thelma K. Walker, Eddie Walls, Jr., Dessie Mae Walls, Alex Warner, Alonzo Warner, Ethel Warner, Albert Weathers, Bome Wells, Carl Lee Wells, Eddie Lee Wells, Katie Wells, James

Whitney, Calvin Williams, Ernestine Williams, Aaron Wilson, Gussie Pearl Wilson, Rev. Willie Wilson, Early Wren, Ruby Wren, and Arthur Wyatt.

c. The defendant Ferd Allen is an adult resident citizen of the City of Fayette, Jefferson County, Mississippi.

d. The defendant Charles Evers is an adult and is a resident citizen of the City of Fayette, Jefferson County, Mississippi, where he maintains individual living quarters, and he also owns and maintains a family residence in the City of Jackson, Mississippi; said Charles Evers at all times mentioned in this bill of complaint was, and is, in the position and office of Field Secretary for the defendant NAACP in the State of Mississippi, and at all times material hereto said Charles Evers was acting and working, and is now acting and working, within the course and scope of this employment with NAACP, and in the furtherance of the business of NAACP; and at all times material hereto NAACP ratified and ratifies all of the hereinafter set forth acts and things done and performed by said defendant Charles Evers.

e. Complainants are informed and believe that the defendant Rudolph Shields has no fixed place of residence, but that said defendant may be found in Yazoo City, Yazoo County, Mississippi.

f. The defendant Aaron Henry is an adult resident citizen of the City of Clarksdale, Coahoma County, Mississippi; said Aaron Henry at all times mentioned in this bill of complaint was and is in the position and office of president of the Mississippi branch of the NAACP, and at all times material hereto said Aaron Henry was acting and working, and is now acting and working, with-

in the course of and scope of his employment with NAACP and in the furtherance of the business of NAACP; and at all times material hereto NAACP ratified and ratifies all of the hereinafter set forth acts and things done and performed by said defendant Aaron Henry.

g. Complainants are informed and believe that the banks set forth in this subparagraph have in their respective hands funds, property and effects of the non-resident defendant NAACP; and said banking institutions are named herein as attachment defendants, and they are as follows: Deposit Guaranty National Bank, First National Bank of Jackson, Citizens National Bank, and Mississippi Bank & Trust Company, all of which are located in the City of Jackson, First Judicial District of Hinds County, Mississippi, where they each have officers and agents upon whom service of process may be had; Bank of Clarksdale, Coahoma National Bank, and The First National Bank of Clarksdale, all of which are located in the City of Clarksdale, Coahoma County, Mississippi, where they each have officers and agents upon whom service of process may be had; Mississippi Southern Bank, and Port Gibson Bank, each of which is located in the City of Port Gibson, Claiborne County, Mississippi, where they each have officers and agents upon whom service of process may be had; The Jefferson County Bank, which is located in the City of Fayette, Jefferson County, Mississippi, where it has officers and agents upon whom service of process may be had; The First National Bank, Commercial National Bank, and Greenville Bank, all of which are located in the City of Greenville, Washington County, Mississippi, where they each have officers and agents upon whom service of process may be had; First National Bank

of Vicksburg, and Merchants National Bank, each of which is located in the City of Vicksburg, Warren County, Mississippi, where they each have officers and agents upon whom service of process may be had; Hancock Bank, Gulf National Bank, and Merchants Bank & Trust Company, all of which are located in the City of Gulfport, Harrison County, Mississippi, where they each have officers and agents upon whom service of process may be had; First National Bank of Biloxi, and The Peoples Bank of Biloxi, each of which is located in the City of Biloxi, Harrison County, Mississippi, where they each have officers and agents upon whom service of process may be had; Britton & Koontz First National Bank, and City Bank and Trust Company, each of which is located in the City of Natchez, Adams County, Mississippi, where they each have officers and agents upon whom service of process may be had; Bank of Mississippi, First Citizens National Bank, and The Peoples Bank & Trust Co., all of which are located in the City of Tupelo, Lee County, Mississippi, where they each have officers and agents upon whom service of process may be had; Commercial Bank, which is located in the City of Woodville, Wilkinson County, Mississippi, where it has officers and agents upon whom service of process may be had; Bank of Prentiss, which is located in the City of Prentiss, Jefferson Davis County, Mississippi, where it has officers and agents upon whom service of process may be had; Indianola Bank, and Peoples Bank of Indianola, each of which is located in the City of Indianola, Sunflower County, Mississippi, where they each have officers and agents upon whom service of process may be had; Bank of Commerce, The Bank of Greenwood, and Leflore Bank and Trust Company, all of which are located in the City of Greenwood, Leflore County, Mississippi, where they each have officers and

agents upon whom service of process may be had; Citizens National Bank, and Guaranty Bank & Trust Company, each of which is located in the City of Belzoni, Humphreys County, Mississippi, where they each have officers and agents upon whom service of process may be had; Bank of Holly Springs, First State Bank, and Merchants and Farmers Bank, all of which are located in the City of Holly Springs, Marshall County, Mississippi, where they each have officers and agents upon whom service of process may be had; Bank of Cleveland, The Cleveland State Bank, and First National Bank of Bolivar County, all of which are located in the City of Cleveland, Bolivar County, Mississippi, where they each have officers and agents upon whom service of process may be had; Citizens Bank of Hattiesburg, First National Bank of Hattiesburg, and Southern National Bank, all of which are located in the City of Hattiesburg, Forrest County, Mississippi, where they each have officers and agents upon whom service of process may be had; The Commercial National Bank and Trust Company, and The First National Bank of Laurel, each of which is located in the City of Laurel, Jones County, Mississippi, where they each have officers and agents upon whom service of process may be had; The Citizens National Bank of Meridian, First National Bank of Meridian and Merchants & Farmers Bank, all of which are located in the City of Meridian, Lauderdale County, Mississippi, where they each have officers and agents upon whom service of process may be had; Grenada Bank, and Grenada Trust & Banking Company, each of which is located in the City of Grenada, Grenada County, Mississippi, where they each have officers and agents upon whom service of process may be had; The Bank of West Point, and The First National Bank, each of which is located in the City of West Point, Clay County,

Mississippi, where they each have officers and agents upon whom service of process may be had; and First Columbus National Bank, Merchants & Farmers Bank, and National Bank of Commerce, all of which are located in the City of Columbus, Lowndes County, Mississippi, where they each have officers and agents upon whom service of process may be had.

3. The complainants bring this suit against each individual named in this bill of complaint; and against each of the individuals whose names are unknown to complainants but who are included herein as a class.

IV.

1. The complainants charge that beginning on or about April 1, 1966, and continuing daily thereafter each, every and all of the defendants, corporate, and individual defendants, hereinbefore set forth, combined and entered into an agreement and conspiracy, with a unity of design and purpose and a preconceived plan, the malicious and unlawful object of which was to ruin and cause injury to the hereinbefore named businesses of the complainants and others; that said defendants did not enter into said conspiracy and combination for the purpose of protecting or advancing any legitimate interests of their own; and that said act constituted an unlawful conspiracy.

2. The complainants charge that the means employed by the defendants, and each of them in carrying out and to effect the purpose of the illegal and unlawful combination, plan, scheme and conspiracy, was and is likewise malicious, illegal and unlawful; that the defendants have since April 1, 1966, daily engaged in and committed malicious, illegal and unlawful acts of injurious falsehoods, deception, force, intimidation, threats, coercion

and violence against the customers and prospective customers of the complainants.

3. The complainants charge that in pursuance of the aforesaid conspiracy to injure the businesses of complainants and others, that the defendants and each of them executed and are continuing to carry out said malicious, illegal and unlawful plan and scheme to the great damage of complainants; and that said conspiracy on the part of all and each of said defendants was induced in malice toward the complainants and was and is without justification or lawful purpose; and that its objects as aforesaid have been and are being accomplished by illegal means and in an unlawful manner.

4. The complainants charge that on or about April 1, 1966, and daily thereafter, the defendants and each of them entered into an unlawful combination among themselves and others who are unknown to complainant to illegally bring about a secondary boycott to the businesses of the complainants and others with the intent and purpose of causing loss to the complainants and others by coercing the customers and prospective customers, against their will, to withdraw and withhold their beneficial business intercourse from the complainants by the infliction of physical injury to said customers and prospective customers on their person and property; by the threat of physical injury; by intimidation so as to put said customers and prospective customers in fear of such injury; through the fear of incurring the displeasure, persecution and vengeance of said combination; and by threats to said customers that unless they withdrew or withheld their beneficial business intercourse from the complainants and others against whom the conspiracy, combination and concert of action is directed, that said combination would cause injury to

said customers in their person, property and business. Complainants further charge that by the use of threats, intimidation, and coercion, the said defendants intended to overcome and did overcome the will of customers and prospective customers of the complainants, and by such unlawful and illegal means, intended to and did compel said customers to refrain from trading with the complainants. Complainants further charge that said defendants committed acts and spoke words to said customers and prospective customers of complainants that caused them to fear for their lives and safety; and that they were in such apprehension of damage that said customers were and are so influenced thereby as to prevent them from freely trading with complainants, as said customers so desire to do; and that the complainants assert that they at no time material hereto had any dispute, disagreement or controversy with any of the defendants herein or the combination thereof. Complainants further charge that the said illegal secondary boycott was and is an unlawful invasion of their property rights; that complainants have been caused to suffer great harm and damage as a result thereof; and that complainants, because of said malicious attempt to irreparably injure them and each of them, without purpose, by said secondary boycott, are entitled to recover damages jointly and severally from said defendants.

5. The complainants charge that after April 1, 1966, when said unlawful conspiracy was formed, the defendants daily committed and are continuing to commit the following unlawful and overt acts against the complainant and others:

a. Sent mass pickets, carrying signs advertising the boycott against the businesses of complainants, and others, to parade around the public streets of Port Gibson.

b. Made public speeches against trading with the complainants and others.

c. Stationed guards in the vicinity of complainants' places of business; and said guards physically stopped the customers and prospective customers from entering the premises of the complainants, and threatened and coerced said customers with physical violence if they traded with the complainants.

d. Threatened to brand the customers and prospective customers of complainants as traitors to the defendants; and referred to said customers in other offensive, abusive and insulting terms.

e. Threatened to destroy all of the property and goods of customers if they made any purchases from the business establishments of the complainants and others.

f. Violently, against the will of certain customers, certain of said defendants acting for the combination took from said customers the personal property which had been purchased from the complainant and others and destroyed said property.

g. Vilified, slandered, abused and intimidated the customers and prospective customers of the complainants when said customers did not forthwith agree to comply with their demands.

h. Physically attacked certain customers of the complainants and other in order to enforce the illegal secondary boycott against the complainants and others.

i. Certain of the defendants, members of the unlawful conspiracy and combination, in order to enforce and carry out the illegal secondary boycott, and to unlawfully interfere with the businesses of the complainants and others, pointed and aimed deadly weapons at said

customers of the complainants and others, and threatened to kill said customers if they did not cease trading with the complainants and others.

j. Certain of the defendants called at the homes of certain of the customers and prospective customers and maliciously sought to induce and did induce said customers not to trade with the complainants and others by threats and coercion.

6. The complainants, as aforesaid herein, operated their said businesses for long periods of time, in the City of Port Gibson. Complainants purchased merchandise for resale to purchasers, and for many years sold at retail said merchandise to said customers in and around Port Gibson. The complainants built up profitable businesses, and had many customers who purchased the merchandise, articles and commodities from them; and complainants gained the good will of virtually all of the customers and prospective customers in and around the community for many years until April, 1966, when the said illegal conspiracy of the defendants began and is continuing to be carried out. The defendants, as aforesaid, intending to destroy the businesses of the complainants because said businesses were located in the City of Port Gibson, and because the owners and managers of the said businesses of the complainants were of the white or Caucasian race, wilfully and unlawfully, by force, violence, threats, intimidation and coercion caused and continue to cause the customers and prospective customers to cease doing business with the complainants. The actions of the defendants in this regard, by their agents, servants and confederates, were done for no justifiable purpose; but were done wrongfully and maliciously to cause loss to the complainants and others, and to injure the businesses of the complainants; to

prevent the complainants from selling articles and commodities to their customers; and for said reason the complainants have been and continue to be unable to sell to their customers and prospective customers who are ready, willing and able to purchase from complainants, because of which some of the complainants have been forced to cease and close their said businesses, as hereinbefore set forth, and all of the complainants have suffered great damage and loss, as hereinafter set forth.

V.

Complainants charge that by reason of the said conspiracy, illegal secondary boycott and malicious conduct of the defendants, the complainants have been caused to suffer great and irreparable harm and damage in the loss of income and profits and good will as follows:

1. Claiborne Hardware Company has suffered loss of income in the amount of $40,000.00, together with the loss of good will in the amount of $15,000.00, and the loss of future income in the amount of $100,000.00; all in the total sum of $155,000.00.

2. Q. H. McDaniel, Jr., doing business as McDaniel Pharmacy, has suffered loss of income in the amount of $67,319.08, together with the loss of good will in the amount of $15,000.00, and the loss of future income in the amount of $168,297.70; all in the total sum of $250,616.78.

3. James E. Hudson, a partner of Hudson Bros., trading as Piggly Wiggly Store at all times material hereto, and as Hudson's Gift Shop in the year 1966, has suffered loss of income in the amount of $68,262.00, together with loss of good will in the amount of $15,000.00, and the loss of future income in the amount of $175,000.00; all in the total sum of $258,262.00. George A.

Hudson, a partner of Hudson Bros., trading as Piggly Wiggly Store at all times material hereto, and as Hudson's Gift Shop in the year 1966, has suffered loss of income in the amount of $68,262.00, together with loss of good will in the amount of $15,000.00, and the loss of future income in the amount of $175,000.00; all in the total sum of $258,262.00. H. B. Hudson, a partner of Hudson Bros. trading as Piggly Wiggly Store and as Hudson's Gift Shop in the year 1966, and thereafter doing business as Hudson's Gift Shop, has suffered loss of income in the amount of $35,760.00, together with loss of good will in the amount of $15,000.00, and the loss of future income in the amount of $66,660.00; all in the total sum of $117,420.00.

4. Waddy Abraham, doing business as Jitney Jungle, has suffered loss of income in the amount of $27,168.52, together with loss of good will in the amount of $15,000.00, and the loss of future income in the amount of $67,821.30; all in the total sum of $109,989.82.

5. Louis Nader Ellis, Executor of the Will and Estate of Michael Ellis, Deceased, shows that said deceased prior to his death and his estate thereafter has suffered loss of income in the operation of the Michael Ellis Department Store in the amount of $47,066.44, together with the loss of good will in the amount of $15,000.00, and the loss of future income to the heirs, devisees, and legatees of said Michael Ellis, deceased, in the amount of $117,666.10; all in the total sum of $179,732.54 in connection with said store. Said complainant further shows that as a result of the burning down of the Trace Theater, the property of said estate, on or about April 8, 1968, said decedent and his estate have suffered the loss of $31,500.00 in the value of said property, and $5,750.00 in the loss of rental income from said property and from

a dwelling house which was damaged by fire on said date, and that the said heirs, devisees and legatees have suffered the loss of future rental income therefrom in the amount of $38,400.00; all in the total sum of $75,650.00.

6. Joe Ellis, Mrs. Ben Mullen and Miss Ella Mae Ellis, doing business as George Ellis Food Store, have suffered loss of income in the amount of $32,123.95, together with loss of good will in the amount of $10,000.00, and the loss of future income in the amount of $80,309.90; all in the total sum of $122,433.85.

7. Louis N. Ellis, doing business as Abe's Betty Jean, has suffered loss of income in the amount of $26,014.02, together with loss of good will in the amount of $10,000.00, and the loss of future income in the amount of $67,445.50; all in the total sum of $103,459.52, with respect to said Abe's Betty Jean. Said complainant, doing business as Port Gibson Trading Co., has suffered loss of income in the amount of $4,407.35, together with loss of good will in the amount of $7,500.00, and the loss of future income in the amount of $84,598.89; all in the sum of $96,506.24, with respect to said Port Gibson Trading Co.

8. H. D. Harwell, doing business as Mack's Package Store, has suffered loss of income in the amount of $4,977.52, together with loss of good will in the amount of $10,000.00, and the loss of future income in the amount of $200,000.00; all in the total sum of $214,977.52.

9. Norman N. Ellis and Barbara B. Ellis, doing business as Ellis Variety Store, have suffered loss of income in the amount of $17,158.42, together with loss of good will in the amount of $15,000.00, the loss in the sale of the stock of goods and the fixtures in said store

in the amount of $52,500.00, and the loss of future income in the amount of $138,208.40; all in the total sum of $222,866.82.

10. W. H. Hay, doing business as O. K. Cleaners and Shirt Laundry, has suffered loss of income in the amount of $15,129.84, together with loss of good will in the amount of $5,000.00, and the loss of future profits in the amount of $37,824.60; all in the total sum of $57,954.44.

11. Murad Nasif and Mildred Nasif, doing business as M & M Super Store and Washateria, have suffered loss of income in the amount of $84,800.12, together with loss of good will in the amount of $25,000.00, and the future loss of income in the amount of $212,000.30; all in the total sum of $321,800.42.

12. Port Gibson Lumber & Supply Company, Inc., has suffered loss of income in the amount of $65,877.00, together with loss of good will in the amount of $25,000.00, and loss of future income in the amount of $250,000.00; all in the total sum of $340,877.00.

13. Charles E. Dobbs, doing business as Western Auto Associate Store, has suffered loss of income in the amount of $12,772.05, together with loss of good will in the amount of $12,000.00, and loss of future earnings in the amount of $38,776.00; all in the total sum of $63,548.05.

14. Kelly S. Conn, doing business as Auto-Lec Associate Store, has suffered loss of income in the amount of $13,192.74, together with loss of good will in the amount of $10,000.00, and loss of future earnings in the amount of $37,527.60; all in the total sum of $60,720.34.

15. A & P Service & Parts, Inc., has suffered loss of income in the amount of $27,223.32, together with loss

of good will in the amount of $10,000.00, and loss of future income in the amount of $75,500.00; all in the total sum of $112,723.32.

16. Allen Motor Company, Inc., has suffered loss of income in the amount of $30,531.48, together with loss of good will in the amount of $15,000.00, and the loss of future income in the amount of $70,286.70; all in the total sum of $115,818.18.

17. Donald-Segrest Ford, Inc., has suffered loss of income in the amount of $20,771.55, together with loss of good will in the amount of $20,000.00, and loss of future income in the amount of $227,614.70; all in the total sum of $268,386.25.

18. Mrs. Edgar A. McCaa, doing business as Town and Country has suffered loss of income in the amount of $5,651.95, together with loss of good will in the amount of $5,000.00, loss on sale of stock of goods in the amount of $9,750.00, and loss of future income in the amount of $15,070.00; all in the total sum of $35,471.95.

VI.

1. The complainants charge the defendants, individually and collectively, with the tortious interference with the right of complainants, and each of them, to pursue their lawful trade and business in the City of Port Gibson, by the use of threats, force, coercion, fraud, defamation, false representation and intimidation for the purpose of preventing people, customers and prospective customers from trading with complainants.

2. The complainants reiterate by reference in order to avoid repetition all of the allegations set forth hereinbefore in support of the charges of interference with complainants' business relations with their customers.

3. Complainants charge that the interference of the defendants with their said business relationship was and is wholly without justification or legal excuse; nor were said acts of interference on the part of said defendants made and done in the exercise of any absolute rights of said defendants.

4. Complainants charge that said acts on the part of the defendants complained of herein were malicious, wilful, intentional, and they were calculated to cause and did cause great harm and damage to the complainants in their said businesses; and that said acts were done with the unlawful purpose of causing complainants damage and loss, without right of justifiable cause on the part of the defendants; and that the complainants were caused to suffer great harm and actual damage as set forth hereinbefore; and that said damages sustained by the complainants were and are a natural and proximate consequence of said wilful interference on the part of said defendants. Complainants further charge that, because of the said unlawful interference on the part of the defendants, complainants and each of them were caused to suffer the loss of customers, good will, past, present, and future earnings, and the value of their business, all in the respective amounts hereinbefore set forth in paragraph V next above.

VII.

1. Complainants charge the defendants herein combined and conspired to commit, and did commit, illegal and unlawful acts injurious to the trade and commerce of the complainants and others; and the results of defendants' acts have been to restrain trade and to hinder the sale and purchase of commodities in and around Port Gibson, Mississippi; and to restrain and attempt to

restrain the freedom of trade in said community, all in violation of Code Sections 1088 and 1089; and complainants invoke the provisions of Code Section 1082 to redress the wrongs done them by the defendants.

2. Complainants reiterate by reference all the allegations set forth hereinbefore in support of the charges in this paragraph of the bill of complaint.

3. Heretofore and after April 1, 1966, the defendants, collectively and individually and in concert with other persons, corporations and associations, unknown to the complainants, federated and conspired together in the restraint of trade for the purpose of creating a monopoly for certain businesses owned by some of the defendants, for the sale of food, clothing and other articles in and around Claiborne County, and for the purpose and intent of injuring the trade and business of the complainants and others, and for the purpose of fixing prices of said commodities, and for the further purpose of depriving the complainants and others in said area of profits and gain.

4. In the furtherance of said illegal scheme said defendants daily sent and caused their agents, servants, employees and confederates to commit acts of force, violence, intimidation, and coercion, all as aforesaid. That said acts were done in the furtherance of said design and conspiracy in which all of the defendants participated, and the same were done and performed for a common purpose as aforesaid. That because of said acts complainants and others have suffered, or are threatened with, a complete loss of trade and business; and the said acts were in violation of the laws and public policy of the State of Mississippi as set forth hereinbefore.

5. For said wrongs complainants ask for the damages and penalties pursuant to Code Section 1092, all in the respective amounts hereinbefore set forth in paragraph V of this bill of complaint, the same being the total aggregate sum of $3,542,466.64.

VIII.

1. Pursuant to Code Section 2729, et seq., complainants ask that the lands, funds, property and effects of the nonresident defendant, as set forth hereinbefore, be attached and held to await the decrees and orders of this Court.

2. Complainants are informed and believe that the nonresident defendant, NAACP and its branches or auxiliary offices in the State of Mississippi, have funds, property and effects in Deposit Guaranty National Bank, First National Bank, Citizens National Bank, and Mississippi Bank & Trust Company, all in Jackson, Mississippi; and in Bank of Clarksdale, Coahoma National Bank, and The First National Bank of Clarksdale, both in Clarksdale, Mississippi; and in Mississippi Southern Bank, and Port Gibson Bank, both in Port Gibson, Mississippi; and in The Jefferson County Bank in Fayette, Mississippi; and in The First National Bank, Commercial National Bank, and Greenville Bank, all in Greenville, Mississippi; and in First National Bank of Vicksburg, and Merchants National Bank, both in Vicksburg, Mississippi; and in Hancock Bank, Gulf National Bank, and Merchants Bank & Trust Company, all in Gulfport, Mississippi; and in First National Bank of Biloxi, and The Peoples Bank of Biloxi, both in Biloxi, Mississippi; and in Britton & Koontz First National Bank, and City Bank and Trust Company, both in Natchez, Mississippi; and in Bank of Mississippi, First Citizens National Bank, and The

Peoples Bank & Trust Co., all in Tupelo, Mississippi; and in Commercial Bank, in Woodville, Mississippi; and in Bank of Prentiss, in Prentiss, Mississippi; and in Indianola Bank, and Peoples Bank of Indianola, both in Indianola, Mississippi; and in Bank of Commerce, The Bank of Greenwood, and Leflore Bank and Trust Company, all in Greenwood, Mississippi; and in Citizens National Bank, and Guaranty Bank & Trust Company, both in Belzoni, Mississippi; and in Bank of Holly Springs, First State Bank, and Merchants and Farmers Bank, all in Holly Springs, Mississippi; and in Bank of Cleveland, The Cleveland State Bank, and First National Bank of Bolivar County, all in Cleveland, Mississippi; and in Citizens Bank of Hattiesburg, First National Bank of Hattiesburg, and Southern National Bank, all in Hattiesburg, Mississippi; and in The Commercial National Bank and Trust Company, and The First National Bank of Laurel, both in Laurel, Mississippi; and in The Citizens National Bank of Meridian, First National Bank of Meridian, and Merchants & Farmers Bank, all in Meridian, Mississippi; and in Grenada Bank, and Grenada Trust & Banking Company, both in Grenada, Mississippi; and in The Bank of West Point, and The First National Bank, both in West Point, Mississippi; and in First Columbus National Bank, Merchants & Farmers Bank, and National Bank of Commerce, all in Columbus, Mississippi; and complainants ask that said funds, property and effects of said non-resident defendant be attached. Complainants are further informed and believe that unless prevented by the process of this Court said banking institutions will presently turn over and remit all of said effects, property and funds to said non-resident defendant and the same will be removed out of the State of Mississippi and beyond the jurisdiction of this Court.

IX.

1. Complainants would show that they have no adequate remedy at law for the harm and damage done and threatened to be done by the defendants; that the property and rights of the complainants are involved and have been and are being interfered with; that the injuries to complainants are substantial, as shown by the facts set forth hereinbefore; that such injuries to the complainants are real and irreparable; and that the illegal, unlawful, malicious and harmful acts of the defendants will continue to occur and continuing harm, damage and injury will be done to the complainants unless the acts and conduct of the defendants hereinbefore complained of are enjoined by this Court.

2. Complainants would show that the defendants, and each of them, corporate, individual, known and unknown, and as a class, and all of those confederating with, aiding and assisting said defendants should be enjoined and prohibited from: (1) Picketing in or about the premises of the complainants; (2) stationing guards at or near the vicinity of the premises of the complainants; (3) soliciting, advising, threatening, coercing and constraining any person from trading with the complainants; (4) interfering with the businesses of the complainants; (5) boycotting the businesses of the complainants; (6) asking or demanding that others cease doing business with the complainants; (7) committing acts in restraint of trade and or in violation of the laws of the State of Mississippi thereunto appertaining.

X.

1. For the wrongs, injuries, loss and damage done to the complainants by the defendants, individually and collectively, the complainants would show that they have

suffered damages in the respective amounts hereinbefore set forth in paragraph V of this bill of complaint, the same being the total aggregate sum of $3,542,466.04; and that said defendants are jointly and severally liable for said damages to the complainants.

PRAYER

WHEREFORE, PREMISES CONSIDERED, complainant prays as follows:

1.

That the funds, property and effects of the non-resident defendant, National Association for the Advancement of Colored People, its branches or auxiliary offices in the State of Mississippi, in the hands of and under the control of the resident defendants, Deposit Guaranty National Bank, First National Bank, Citizens National Bank, and Mississippi Bank & Trust Company, Jackson, Mississippi; and Bank of Clarksdale, Coahoma National Bank, and The First National Bank of Clarksdale, Clarksdale, Mississippi; and Mississippi Southern Bank, and Port Gibson Bank, Port Gibson, Mississippi; and The Jefferson County Bank, Fayette, Mississippi; and The First National Bank, Commercial National Bank, and Greenville Bank, Greenville, Mississippi; and First National Bank of Vicksburg, and Merchants National Bank, Vicksburg, Mississippi; and Hancock Bank, and Gulf National Bank, and Merchants Bank & Trust Company, Gulfport, Mississippi; and First National Bank of Biloxi, and The Peoples Bank of Biloxi, Biloxi, Mississippi; and Britton & Koontz First National Bank, and City Bank and Trust Company, Natchez, Mississippi; and Bank of Mississippi, First Citizens National Bank, and The Peoples Bank & Trust Co., Tupelo, Mississippi; and Commercial Bank,

Woodville, Mississippi; and Bank of Prentiss, Prentiss, Mississippi; and Indianola Bank, and Peoples Bank of Indianola, Indianola, Mississippi; and Bank of Commerce, The Bank of Greenwood, and Leflore Bank and Trust Company, Greenwood, Mississippi; and Citizens National Bank, and Guaranty Bank & Trust Company, Belzoni, Mississippi; and Bank of Holly Springs, First State Bank, and Merchants and Farmers Bank, Holly Springs, Mississippi; and Bank of Cleveland, The Cleveland State Bank and First National Bank of Bolivar County, Cleveland, Mississippi; and Citizens Bank of Hattiesburg, First National Bank of Hattiesburg, and Southern National Bank, Hattiesburg, Mississippi; and The Commercial National Bank and Trust Company and The First National Bank of Laurel, Laurel, Mississippi; and The Citizens National Bank of Meridian, First National Bank of Meridian, and Merchants & Farmers Bank, Meridian, Mississippi; and Grenada Bank and Grenada Trust & Banking Company, Grenada, Mississippi; and The Bank of West Point, and The First National Bank, West Point, Mississippi; and First Columbus National Bank, Merchants & Farmers Bank, and National Bank of Commerce, Columbus, Mississippi, be attached and that said herein named resident defendant banks be summoned personally in the manner provided by law in cases of attachment in chancery, returnable to the next regular term of this Court. And that the herein named non-resident defendant be served by serving process upon its duly registered resident agent for process, in the manner provided by law; and that all other resident defendants be summoned personally; so that all of said resident defendants and said non-resident defendant may be required to appear at the next regular term of this Honorable Court, then and there to answer this bill of complaint, and that the

answer of all of said defendants except the herein named resident defendant banks shall not be under oath, answer under oath being hereby expressly waived, except as to the answer of said resident defendant banks.

2.

That upon a final hearing, except as to the said resident defendant banks, named in paragraph 1 of this prayer, an injunction issue, enjoining and prohibiting the defendants, and each of them, and all members of the incorporated defendant organization, and the branches thereof, and all persons confederating with, aiding and assisting the defendants in the acts herein complained of, from committing any of the following acts, directly or indirectly, through any person, firm, corporation or association: (1) Picketing in or about the business premises of the complainants, (2) stationing guards at or near the vicinity of the said premises of the complainants; (3) soliciting, advising, threatening, coercing and constraining any person from trading with complainants; (4) interfering with the businesses of the complainants; (5) boycotting the businesses of the complainants; (6) asking or demanding that others cease doing business with the complainants; (7) committing acts in restraint of trade and or in violation of the laws of the State of Mississippi thereunto appertaining.

3.

That upon the final hearing hereof complainants may have a decree against the said non-resident defendant and the resident defendants, except said resident defendant banks named in paragraph 1 of this prayer, jointly and severally, for the damages sustained by each of the complainants, as follows: (1) That complainant Claiborne Hardware Company may have a decree against

said defendants in the total sum of $155,000.00; (2) that the complainant Q. H. McDaniel, Jr., may have a decree against said defendants in the total sum of $250,616.78; (3) that the complainant James E. Hudson may have a decree against said defendants in the total sum of $258,262.00, that the complainant George A. Hudson may have a decree against said defendants in the total sum of $258,262.00, and that the complainant H. B. Hudson, Jr., may have a decree against said defendants in the total sum of $117,420.00; (4) that the complainant Waddy Abraham may have a decree against said defendants in the total sum of $109,989.92; (5) that the complainant Louis Nader Ellis, Executor of the Will and Estate of Michael Ellis, Deceased, may have a decree against said defendants in the total sum of $255,382.54; (6) that the complainants Joe Ellis, Mrs. Ben Mullen and Miss Ella Mae Ellis may have a decree against said defendants in the total sum of $122,433.85; (7) that the complainant Louis N. Ellis may have a decree against said defendants in the total sum of $198,965.76; (8) that the complainant H. D. Harwell may have a decree against said defendants in the total sum of $214,977.52; (9) that the complainants Norman N. Ellis and Barbara B. Ellis may have a decree against said defendants in the total sum of $222,866.82; (10) that the complainant W. H. Hay may have a decree against said defendants in the total sum of $57,954.44; (11) that the complainants Murad Nasif and Mildred Nasif may have a decree against said defendants in the total sum of $321,800.42; (12) that the complainant Port Gibson Lumber & Supply Company, Inc., may have a decree against said defendants in the total sum of $340,877.00; (13) that the complainant Charles R. Dobbs may have a decree against said defendants in the total sum of $63,548.05; (14) that the complainant Kelly S. Conn

may have a decree against said defendants in the total sum of $60,720.34; (15) that the complainant A & P Service & Parts, Inc., may have a decree against said defendants in the total sum of $112,723.32; (16) that the complainant Allen Motor Company, Inc., may have a decree against said defendants in the total sum of $115,818.18; (17) that the complainant Donald-Segrest Ford, Inc., may have a decree against said defendants in the total sum of $2683.25; (18) that the complainant Mrs. Edgar A. McCaa may have a decree against said defendants in the total sum of $35,471.95; all in the total aggregate sum of $3,542,466.04. And that the funds and property of said non-resident defendant in the hands and under the control of said resident defendant banks, or so much thereof as is necessary to pay the amount of said decree, be applied to the payment of said decree, on a pro rata basis to the complainants, respectively, if insufficient to pay the total amount thereof.

And complainants pray for general and special relief, and as in duty bound will ever pray.

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Note: The foregoing Bill of Complaint was duly verified by the affidavit of each of the state court complainants to the effect that the matters and facts set forth as true, insofar as they relate to the respective business of the affiant and to the acts and conduct of the defendants, are true and correct as therein stated, and as to all other matters alleged therein each affiant on information and belief verily believes the same to be true.

The affidavits cover considerable space and are necessarily repetitious. For these reasons, and with the foregoing statement of the nature of the affidavits, which were attached to the Bill of Complaint, the affidavits are omitted.

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FILED
MAR 3 1972
E. ROBERT SEAVER, CLERK

No. 71-605

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

AARON HENRY, ET AL. ..... Petitioners

V.

CLAIBORNE HARDWARE CO., ET AL. Respondents

RESPONSE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Other Authorities:

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

No. 71-685

AARON HENRY, ET AL. Petitioners

V.

CLAIBORNE HARDWARE CO., ET AL. Respondents

RESPONSE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Pursuant to the direction of the Court the Respondents file this their response in opposition to the Petition For a Writ of Certiorari in the above entitled and numbered case.[1]

OPINIONS BELOW

Respondents adopt the matters set forth in the petition under this heading.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

1. Whether or not the Circuit Court of Appeals for the Fifth Circuit was correct in holding that there is no

[1] Letter to counsel for respondents from Michael Rodak, Jr., Chief Deputy Clerk, dated January 12, 1972; application for extension of time to file response granted to March 3, 1972, by letter dated February 11, 1972, from Rodak.

"state action" to be found in the mere filing of a private civil tort action in state court; and in directing that the order of the district court, enjoining the prosecution of the pending state court civil action, should be vacated and the cause remanded with instructions to dismiss the amended complaint for lack of jurisdiction.

STATEMENT

A. The Underlying Facts

Early in 1966 certain black citizens living in the southwestern part of Mississippi were engaged in a dispute with the officials of the town of Port Gibson and Claiborne County, Mississippi, concerning some practices of the officials which were considered by the group to be racially discriminatory. Beginning about April 1, 1966, and regularly thereafter, the group met in a church in Port Gibson. At the initial meeting, the individuals composing the group entered into an agreement to boycott all business establishments owned and operated by white citizens in the county. The preconceived plan and design was to bring economic pressure on the white business operators to compel them in turn to insist that the public officials accede to the demands of the black citizens group. At the outset the black citizens had no primary dispute with the white business operators.

Between 1966 and the middle of 1969, the black citizens group succeeded in securing certain concessions from the officials of the county and town, including the appointment of a black law enforcement officer. The pressure of the boycott during this period varied in the degree of intensity and effectiveness.

In the summer of 1969, a black policeman on the Port Gibson police force killed a black man. The emotions of

the black community were greatly agitated by the incident. The black citizens group demanded that the black policeman be fired and punished. The officials of Port Gibson refused, stating that an investigation of the incident revealed that the black policeman had not acted improperly.

The black citizens group responded by intensifying the boycott of all white owned and operated business establishments in Claiborne County, with some few exceptions.

During the entire period the black citizens group employed violent tactics which had the effect of coercing the customers and prospective customers, against their will, to cease trading with the white merchants. The tactics employed included: the infliction of physical injury on and property damage to the customers; threatening physical injury; intimidation of customers and putting them in fear of injury; branding black customers as traitors; using abusive and insulting language toward the black customers. The black citizens group sent mass pickets into the streets and sidewalks of Port Gibson; made speeches against trading with the white merchants; stationed guards in the vicinity of the business establishments of the white merchants and there physically stopped the customers from entering the premises; villified, slandered and abused black customers who did not agree to cease trading with the white merchants; physically attacked and beat certain black customers and destroyed their property. By the late summer and early fall of 1969, a reign of terror, fear and violence existed in Claiborne County. The white business establishments were caused to suffer great and irreparable harm and damage in the loss of income, profits and good will.

B. The State Court Proceedings

Twenty-three individual and corporate complainants, white owners and operators of the boycotted Port Gibson business establishments, filed a verified bill of complaint in the Chancery Court of the First Judicial District of Hinds County, Mississippi, on October 31, 1969. The defendants in the state court suit were: (1) the National Association for the Advancement of Colored People (NAACP), a New York Corporation; (2) Mississippi Action For Progress, Inc. (MAP), a non-profit Mississippi corporation; (3) 159 individuals; and (4) 53 Mississippi banking institutions.

The state court suit sought injunctive relief and adequa compensation for: (1) the wrongful civil conspiracy; (2) the common law secondary boycott;[2] the common law tort of interference with a business relationship; and (4) the restraint of trade.[3]

The ministerial act of issuing the summons[4] commanding the sheriff of the proper county to summon the defendants to appear and answer on the return day was performed by the Hinds County Chancery Clerk.

B. The Federal Court Proceedings.

Respondents adopt by reference the statement of the proceedings in the federal court as set forth in the

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[2] Petitioners mistakenly assert at page 7 of their petition that the suit was based in part on "the state 'secondary boycott' statute, Miss. Code § 2059.3 (Supp.1971) . . ." An examination of the state court Bill of Complaint, reproduced here in a Supplemental Appendix, will reveal that the basis for that portion of the equity action was based on the Mississippi common law rather than the newly enacted state statute.

[3] Miss. Code §§ 1088, 1089, and 1092.

[4] Miss. Code § 1845

A summons shall not issue in any case, at law or in chancery until the declaration, bill, petition, or other pleading beginning the cause shall be filed. The process to bring in defendants, at law and in chancery, shall be a summons, and it shall command the officer to summon the defendant to appear and answer on the return day.

opinion[5] of the Circuit Court of Appeals for the Fifth Circuit.

SUMMARY OF THE ARGUMENT

There is no "state action" to be found in the mere filing of a private tort suit in the state court. The order of the district court of the Northern District of Mississippi, enjoining the prosecution of a civil action in the Mississippi Chancery Court was correctly ordered vacated by the United States Court of Appeals for the Fifth Circuit and the cause remanded to the district court with instructions to dismiss petitioners' amended complaint based on 42 USC §1983 because the federal district court lacked jurisdiction. In providing a forum to determine the rights of the state court parties, Mississippi does not clothe the litigants with the power and authority of the state.

There is no element of state compulsion where the only involvement of Mississippi was in providing a forum to determine the rights of the contending parties. The requisite "state action" under §1983 is not established by the fact that one group of private citizens filed suit against other private citizens seeking equitable relief and damages for: (1) a wrongful civil conspiracy; (2) a state common law secondary boycott; (3) the common law tort of interference with a business relationship; and (4) the restraint of trade. The state court complainants were under no compulsion by any Mississippi statute or custom of the state, having the force of law, to initiate a civil suit in the Mississippi Chancery Court. Mississippi in no way commanded the state court complainants to file suit. Mississippi has no enforced custom of requiring white business operators to file suit

[5] Appendix pp. a81-a89.

against black citizens when the white business persons are damaged by the deliberate and concerted activities of black citizens who were in a primary dispute with the town of Port Gibson and the County of Claiborne over certain practices which the black citizens regarded as racially discriminatory. The state court complainants were not participants in any joint activity with the State of Mississippi, its agents, or any of the political subdivisions of the state or any agents thereof.

The ministerial acts of the chancery court clerk and the various county sheriffs in issuing and serving process are not acts "under color of law." There is no charge that these officials acted in any manner other than that required in the ordinary performance of their duties, and there is likewise no allegation that the clerk and sheriffs conspired with the state court complainants. There is no showing of a clear, intentional or purposeful discrimination on the part of the state officers or purposeful discriminatory administration of a state statute, fair on its face. The Mississippi court has entered "no order in judgment" in which the power of Mississippi is involved. By holding its courts open to litigation of complaints, regardless of how lacking in substance the suits may prove to be, Mississippi does not clothe litigants with the authority of the state.

The existence of an alleged "chilling effect" in the area of First Amendment rights, by the mere filing of the state court suit, is not and has never been considered a sufficient basis in and of itself for the prohibition of state court action.

The decision of the Fifth Circuit Court of Appeals is not in conflict with any decision of the Supreme Court, nor with the decision of any other United States Circuit Court of Appeals on this point.

There are no constitutional questions properly presented for decision in this case, because no timely appeal was taken by the bank or state court complainants on the validity of the district court's injunction against the attachments. The state court complainants confined their appeal to the validity of the order of the district court entered on June 9, 1970, enjoining the prosecution of the state court action. Neither the validity of the attachment nor the December 15, 1969, preliminary injunction was presented to the Circuit Court of Appeals. Petitioners are not entitled to declaratory judgments regarding the constitutionality of certain Mississippi statutes because the petitioners have no standing in the Supreme Court to challenge the constitutionality of the Mississippi code sections for the reason that no timely appeal was taken by the petitioners from the orders of the district court granting the preliminary injunctions prayed for by the petitioners.

The judgment of the court of appeals for the Fifth Circuit should be affirmed, and the petition for a writ of certiorari should be denied.

REASONS FOR NOT GRANTING THE WRIT

I. The Opinion And Decision Of The Court Of Appeals For The Fifth Circuit Is Not In Conflict With Any Decision Of The Supreme Court.

The Circuit Court of Appeals in its opinion [6] concluded that there was no "state action" to be found in the mere filing of a private tort suit in the state court. On this finding, the order of the district court enjoining the prosecution of the pending state civil action was ordered vacated and the cause remanded with instructions to dismiss the amended complaint for lack of jurisdiction.

[6] Appendix p. a101

The petitioners contend that "In sum, the decision of the Court of Appeals seems irreconcilable with the decision of this Court in *Adickes v. S. H. Kress & Co.*, 398 US 144 (1970), which again put to rest the discredited notion 'that a private person is necessarily immune from liability under §1983 because of the "under color of" law requirement of the statute,' 398 US at 173, n. 44 . . ."

Respondents contend that in providing a forum to determine the rights of the state court parties, Mississippi does not clothe the litigants with the power and authority of the state, and the decision of the Circuit Court of Appeals does not conflict with *Adickes* or *United States v. Price*,[7] inferentially relied on by petitioners, or any other decision of the Supreme Court.

In *Adickes*, Mr. Justice Harlan expressing the view of seven members of the court said:

> ". . . §1 of the Fourteenth Amendment does *not* forbid a private party, *not* acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections. As was said in *Shelley v. Kraemer*, *supra*, §1 of '(t)hat Amendment erects no shield against merely private conduct however, discriminatory or wrongful.' 334 US, at 13, 92 L Ed, at 1180, 3 ALR 2d 441."[8] (Emphasis supplied)

There is absolutely no element of state compulsion in the Mississippi chancery suit entitled *Claiborne Hardware Company, et al., v. NAACP, et al.*, and the only involvement of the state was in the providing of a forum to determine the rights of the contending parties. The state court complainants were under no state compulsion

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[7] 383 US 787, 16 L Ed 2d 267, 86 S Ct 1152
[8] 398 US at 169; 26 L Ed 2d at 164

by statutory provision or by custom, having the force of law, to initiate a civil action in the Mississippi chancery court. In no manner could it be said that Mississippi commanded the state court complainants to file suit. Likewise, it is plain that the state court complainants were not required to file suit because of a Mississippi enforced custom of requiring white business operators to file suit because they were damaged in their business operations by the deliberate and concerted actions of black citizens.

There is no fact in the record of this case, which suggests that the state court complainants were willing participants in any joint activity with the State of Mississippi or any of its agents in the filing of the state chancery actions as was the situation in *United States v. Price*.[9]

In order to state a cause of action under 42 USC §1983, it is necessary to allege specific facts, (not unsupported general allegations) that the act of the state court complainants in filing the Mississippi chancery action was for the willful purpose of discriminating against the state court defendants.[10] The petitioners failed to set forth in their federal court complaint any such specific [illegible]. The charge is by unsupported general allegations. Making representations to a state official even in a report required by law, is not acting "under color of law" for the reason that such reports are not considered to be done on behalf of the state.[11]

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[9] 383 US at 794, 16 L Ed at 272

[10] *Walker v. Bank of America*, 268 F2d 16, 24, 25 (9CA, 1959) cert den 361 US 903, 4 L Ed 2d 158, 80 S Ct 211, reh den 361 US 941, 4 L Ed 2d 361, 80 S Ct 367.

[11] *Schatte v. International Alliance of Theatrical State Employees and Moving Picture Machine Operators of the United States and Canada, et al.*, (9CA, 1950) 182 F2d 158, 166, 167.

The acts of the deputy chancery clerk in preparing and transmitting the summons to the various deputy sheriffs who served the defendants are not acts "under color of state law" sufficient to form the basis of jurisdiction under §1983.[12] Petitioners do not charge that the deputy clerk and deputy sheriffs acted in any manner other than that required in the ordinary performance of their duties. There are no allegations that these officials conspired with the state court complainants. Discriminatory purposes on the part of clerks and sheriffs in the ordinary performance of their duties cannot be presumed.[13] On the other hand, it can be presumed that the clerk and the sheriffs, in the performance of the ministerial duties, acted in compliance with a state statute, which is fair on its face. In order to bring the action of the clerk and sheriffs within the ambit of §1983, there must be a showing of "clear and intentional discrimination," and the purposeful discriminatory administration of a statute fair on its face.[14] No discriminatory purpose on the part of the clerk and sheriffs is charged or shown by the petitioners.

The 1871 Civil Rights statutes were intended to provide for redress against state action which discriminated against individuals within the jurisdiction of the United States. These statutes do not have the effect of bringing under federal control the protection of private rights against invasion by individuals. The protection of such rights and the redress for such wrongs have been left with the states.[15]

Petitioners assert that when private litigants, whose objectives are to interfere with the rights of other per-

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[12] *Dinwiddie v. Brown*, (5CA, 1956) 230 F2d 465, 469.
[13] *Snowden v. Hughes*, (1943) 321 US 1, 8, 9, 88 L Ed 497, 503; *Terrance v. Florida*, 188 US 519, 520, 47 L Ed 572, 573, 23 S Ct. 402.
[14] 321 US at 8, 9; 88 L Ed at 503.
[15] *Love v. Chandler* (8CA, 1942) 124 F2d 785, 786, 787.

sons, initiate an action in the state court to attain that end, such litigants are "supported by the full panoply of state power," and it cannot be said that the act of initiating the suit is free of state involvement. The petitioners cite *Shelley v. Kraemer*[16] in support of the contention. Only in the subjective consciousness of the petitioners is there any evidence that the objectives of the respondents in filing the state court suit was to interfere with the rights of the petitioners.

Judge Hays, speaking for the Court of Appeals for the Second Circuit in *Stevens v. Frick*,[17] holds that Pennsylvania, by providing a forum for *Frick*, does not establish the requisite state action[18] under § 1983. The court points out that the state judicial action involvement in *Shelley* is readily distinguishable from the facts in the *Stevens* case. In *Stevens*, as in this case, "... no order or judgment has been entered under which the power of the state is involved ... Thus far, Pennsylvania has merely provided a forum to determine the rights of the parties. Both logic and precedent suggest that merely by holding its courts open to litigation of complaints, regardless of how baseless they eventually prove to be, Pennsylvania does not clothe persons who use its judicial processes with the authority of the state in the sense that *Stevens* suggests. See *Bottone v. Lindsley*, 170 F.2d 705 (10th Cir. 1948), cert. denied, 336 U.S. 944, 69 S. Ct. 810, 93 L. Ed. 1101 (1949); *Skolnick v. Martin*, 317 F.2d 855, 857 (7th Cir.), cert. denied, 375 U.S. 908, 84 S. Ct. 199, 11 L. Ed. 2d 146 (1963); *Skolnick v. Spolar*, 317 F.2d 857 (7th Cir.), cert. denied, 375 U.S. 904, 84 S. Ct. 195, 11 L. Ed. 2d 145 (1963)."

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[16] 334 US 1, 68 S Ct 836, 92 L Ed 1161 (1948)
[17] 372 F2d 378 (1967)
[18] Id. at p. 381

The fact that the petitioners "feel inhibited", even if true, is not "sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution. A federal law suit to stop . . . a state court is a serious matter."[19]

In *Younger* this court said the national policy forbidding federal courts to enjoin pending state court proceedings is violated by the issuance of an injunction where the defendant has an opportunity to raise his defenses in the state court.[20] The petitioners contend that the filing of the suit has a "chilling effect on their First Amendment Rights." Again in *Younger*, this court said: "... the existence of a 'chilling effect', even in the area of First Amendment rights, has never been considered a sufficient basis in and of itself for prohibiting state action."[21]

Also in *Younger* the Supreme Court said: ". . . we hold that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state . . . prosecutions."[22]

Petitioners contend that the decision of the Court of Appeals for the Fifth Circuit in *Henry, et als, v. Claiborne Hardware Co., et al.*, is in conflict with *New York Times v. Sullivan*.[23] The Fifth Circuit disposed of this contention by quoting from the opinion of this court in the *New York Times* case, wherein it was said that ". . . The test is not the form in which state power has been applied, but whatever the form, whether such power has

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[19] *Younger v. Harris* (1971) 401 US 37, 42, 27 L Ed 2d 669, 674, 675, 91 S Ct 746.
[20] 401 US at p. 40, 41, 27 L Ed 2d at 670, 673, 674.
[21] 401 US at p. 51, 27 L Ed 2d at p. 679.
[22] 401 US at p. 53, 27 L Ed 2d at p. 681, 91 S Ct 746.
[23] 376 US 254, 11 L Ed 2d 686, 84 S Ct 710 (March 9, 1964)

in fact been exercised."[24] The private litigants in this case did not exercise state power, and the *New York Times* case is not applicable.

II. There Is No Conflict Among The Circuits With The Decision Of The Fifth Circuit Court Of Appeals In This Case.

The decision of the Fifth Circuit Court of Appeals in this case is fully in accord with the decisions of the other circuits where the issue of "state action" has been squarely presented. Petitioners make no allegations in the petition that the decision in this case is in conflict with other circuits where the precise issue of the presence of "state action" in the mere filing of a law suit by private parties against other private parties was considered.

The opinion of the Fifth Circuit in this case states:[25]

"...there is a long line of cases which conclude that a state, by merely holding its courts open to litigation of complaints, does not clothe the persons who use its judicial processes with the authority of the state. See *Skolnick v. Martin*, 7th Cir., 317 F.2d 853, cert. denied, 375 U.S. 908, 84 S. Ct. 199 (1963); *Skolnick v. Spolar*, 7th Cir., 317 F.2d 857, cert. denied, 375 U.S. 904, 84 S. Ct. 195 (1963); *Moffett v. Commerce Trust Co.*, 8th Cir., 187 F.2d 242, cert. denied, 342 U.S. 718, 72 S. Ct. 32 (1951); *Campo v. Niemeyer*, 7th Cir. 1950, 182 F.2d 115; *Swift v. Fourth Nat'l Bank*, M.D. Ga. 1962, 205 F. Supp. 563; *Bottone v. Lindsley*, 10th Cir. 1948, 170 F.2d 705, cert. denied, 336 U.S. 944, 69 S. Ct. 810 (1949). See also *Jones v. Jones*, 7th Cir. 1969, 410 F.2d 365, cert. denied, 396 U.S. 1013, 90 S. Ct. 547 (1970); *Rhodes v. Meyer*, 8th Cir., 334 F.2d 709, cert.

[24] Appendix a91, a92; 376 US at 265, 84 S Ct 718
[25] Appendix a93.

denied, 379 U.S. 915, 85 S. Ct. 263 (1964); *Sarelas v. Porikos*, 7th Cir. 1963, 320 F.2d 827; *Waldrop v. Ross*, W.D. Pa. 1970, 319 F. Supp. 1299; *Drexler v. Walters*, D. Minn. 1968, 290 F. Supp. 150; and *Pritt v. Johnson*, M.D. Pa. 1967, 264 F. Supp. 167 (holding that attorneys who participate in litigation are not acting under color of state law within the civil rights statute). The leading case on this question, which presents a fact pattern very similar to the case at hand, seems to be *Stevens v. Frick*, 2d Cir., 372 F.2d 378, cert. denied, 387 U.S. 920, 87 S. Ct. 2034 (1967) . . ."

The Second Circuit, in *Stevens v. Frick*,[26] cites three cases from the Tenth and Seventh Circuits holding, as has the Fifth Circuit in this case, that a state does not clothe persons who use the judicial processes with the authority of the state. Petitioners have cited no case in any circuit on this point which is in conflict with the opinion in this case.

III. There Are No Constitutional Questions Properly Presented In This Case.

At the outset, the Court of Appeals for the Fifth Circuit took great pains to outline in its opinion "a clear picture of what transpired" in the district court and to state "what is and what is not raised in this interlocutory appeal, (and this) is essential to an understanding of our disposition of this case."[27]

The Fifth Circuit Court of Appeals outlined the ". . . Facts and Procedural History."[28] No appeal was taken either by the banks or state court complainants from the interlocutory injunction of December 15, 1969. The court

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[26] 372 F2d at p. 381.
[27] Appendix, pp. a75, a76.
[28] Id. pp. a76-a89.

said that consideration of the validity of the "December 15 interlocutory injunction against the attachments" might be within the scope of its reviewing powers; however, "we decline to do so for several reasons." The court then states the reasons for limiting the appeal, and said: "... the state court complainants here have confined their appeal to questioning the validity of a subsequent order of the court entered on June 9, 1970..."[29]

The court of appeals stated that state court complainants in their appeal from the June 9, 1970, order, also urged that 28 USC §2283, the anti-injunction statute, is an absolute bar to the enjoining of the pending state civil suit; and that petitioners had no absolute right to picket, march, and demonstrate. The appeals court continued, stating: "Because we have decided that federal jurisdiction was lacking to support the cause of action alleged in the complaint, we do not reach the second and third issues."[30] Then the Court said: "... *neither the validity of the attachments below nor the validity of the December 15 preliminary injunction against them is presented to us in this appeal.*" (Emphasis supplied).[31] "The 'state action' which may be found in ministerial acts performed in connection with prejudgment attachments does not necessarily extend to the otherwise wholly private action of a still undecided underlying pending civil suit; in the facts of this case, it most certainly does not."[32]

Petitioners, nevertheless, contend that they "... were at least entitled to declaratory judgment regarding the

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[29] Id. pp. a83-a87, fn. 4-10.
[30] Id. p. a84.
[31] Id. p. a98.
[32] Id. p. a101.

constitutionality of state statutes,[33] (and) the Court of Appeals should have remanded the case to the District Court for further proceedings, not with instructions 'to dismiss the amended complaint for lack of jurisdiction.' "[34]

Respondents contend, as a matter of law, that since the issues of the constitutionality of the Mississippi statutes and the effect of the attachment proceedings were neither raised before nor considered by the Court of Appeals for the Fifth Circuit the Supreme Court will not ordinarily consider such issues.[35]

The petitioners have no standing in the Supreme Court to challenge the constitutionality of the hereinbefore set forth Mississippi Code sections for the reason that no timely appeal was taken by the petitioners from the or-

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[33] Presumably, petitioners are referring to Mississippi Code, 1942, §§1088, 1089, and 1092 (state anti-trust statutes Appendix, pp. a2-a6; a77-a79, fn. 2); 2059.3 (Conspiracy—unlawful restraint of trade—civil liability, Appendix, pp. a1-a2 (1971), (this statute was not utilized by the state court complainants in their suit in the Mississippi Chancery Court); 2729 (Non-residents—absent or absconding debtors, Appendix, p. a33, fn. 2); 2730 (Attachment against nonresidents—how effects or indebtedness bound, Appendix, p. a33, a34, fn. 2); Recompiled 1956, 1957.

[34] Petition p. 29.

[35] *Adickes v. Kress & Co.*, 398 US 144, 147, 26 L Ed 2d 142, 148, 90 S Ct 1598, fn. 2; *Lawn v. United States*, 355 US 339, 362-363, n. 16, 2 L Ed 2d 321, 337, 78 S Ct 311 (1958); *Husty v. United States*, 282 US 694, 701-702, 75 L Ed 629, 632, 633, 51 S Ct 240 (1931); *Duignan v. United States* 274 US 195, 200, 71 L Ed 996, 1001, 47 S Ct 566 (1927). The United States Supreme Court will not consider questions which were not considered by the courts below. *Hines Yellow Pine Trustees v. Martin*, 268 US 458, 69 L Ed 1050, 45 S Ct 543. In reviewing a decision of the court below, the Supreme Court will not pass in a question not considered below. *Mabee v. White Plains Pub. Co.* 327 US 178, 90 L Ed 607, 66 S Ct 511. A question raised for the first time in the United States Supreme Court will not be considered by it; *White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 US 692, 73 L Ed 903. The Supreme Court will not consider a point first raised by the petition for certiorari; *Helvering v. Minnesota Tea Co.* 296 US 378, 80 L Ed 284, 56 S Ct 269. The Supreme Court will not pass on a point not considered by the Circuit Court of Appeals; *Zellerbach Paper Co. v. Helvering* 293 US 172, 79 L Ed 264, 55 S Ct 127.

ders of the district court granting the preliminary injunctions prayed for by the petitioners.

A review of the proceedings in the district court is essential for coherent presentation of this point. The original complaint of this suit was filed on November 7, 1969, by Aaron Henry, president of both the Mississippi State Conference and the Coahoma Branch of the NAACP. In the original complaint, plaintiff charged that their operational funds had been frozen without notice and hearing. They sought "to enjoin (the) attachment of property belonging to them made without compliance with fundamental constitutional guarantees." The district court held a hearing on the original plaintiff's motion for a temporary restraining order on November 17, 1969, at which time the defendant bank[36] appeared and moved, ore tenus, to have the state court complainants made parties to the proceedings on grounds that the state court complainants claimed an interest in the contested funds. The district court granted the motion of the bank as well as the original plaintiff's motion for a temporary restraining order, and set December 1, 1969, for a hearing on the motion for a preliminary injunction. At the December 1 hearing, the state court complainants appeared and contested the motion. At the conclusion of this hearing, the district judge announced that he would grant the motion for a preliminary injunction. On December 15, 1969, the district court entered an order directing the defendant banks "to release all funds held by them pursuant to the writs of attachment . . . upon posting by plaintiffs . . . of a bond in the amount of 110% of (the) funds." The state court complainants were prohibited from subjecting or causing to be subjected in any way funds of the original plaintiffs deposited in the

[36] First National Bank of Clarksdale.

defendant banks to attachment or other process which would cause the original plaintiffs to be deprived of the use of their funds.

The Fifth Circuit Court of Appeals found that no appeal was taken by either the banks or the state court complainants from the interlocutory injunction of December 15, 1969. The time for appeal from such order or the request for an interlocutory appeal from such order had long since passed.[37]

Petitioners now ask the Supreme Court to rule that Mississippi Code §§2059.3 (the conspiracy statute in unlawful restraint of trade—civil liability) and 2729 and 2730 (the non-resident Mississippi chancery attachment statutes) violate their constitutional rights. Although ample opportunity was afforded petitioners to raise this question in the district court, and in the court of appeals they failed so to do.

It is a fundamental rule of law that failure to cross appeal, first to the Court of Appeals for the Fifth Circuit, from the adverse part of the decision of the district court, would preclude subsequent review by the United States Supreme Court.[38] The failure to cross appeal the adverse part of the decision of the district court now precludes the review of these questions by the Supreme Court.[39]

In *Penfield Company v. Securities & Exchange Com.*, certiorari was granted to one who had been held in contempt. The United States Supreme Court held that the contemnor was precluded at the certiorari level from renewing objections to the merits of the judgment of

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[37] Appendix a82, a88 and a84.
[38] 32 Am. Jur. 2d, Federal Practice and Procedure, Section 301 at pages 773, 774.
[39] Annotation 1 L Ed 2d 1829, 1830.

contempt since these were considered and determined against him by the district court, and he did not appeal from that adverse judgment.[40]

In *Harrison v. Perea*,[41] the trial court entered a decree in favor of the complainant for an accounting of property and assets of the estate of a decedent; found the amount due from defendant to complainant, and decreed its payment. The defendant, alone, appealed to the Supreme Court of the territory which affirmed the decree. The defendant then appealed to the United States Supreme Court, and the complainant cross appealed. In the cross appeal the complainant attempted a modification of the judgment of the lower court with regard to the parties to the distribution. The United States Supreme Court refused to consider the question, pointing out that the complainant, not having appealed from the trial court, and the appellate court below having simply affirmed the provision in question, the defendant's appeal from the latter decree did not bring up this question for review, and that all that the complainant could claim in the court below was the affirmance of the decree, because he could not be heard to ask for its modification or reversal. When the court below affirmed the pertinent provision of the decree, the complainant's cross appeal would not bring the propriety of the provision for distribution before the United States Supreme Court. The same ruling was made as to the complainant, upon his cross appeal, asking for a modification of the decree to secure a higher rate of interest from the defendant.

A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he

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[40] 330 US 585, 91 L Ed 1117, 67 S Ct 918, Reh Den 331 US 865, 91 L Ed 1870, 67 S Ct 1301 (1947).

[41] 168 US 311, 42 L Ed 478, 18 S Ct 129 (1897).

may not attack it even on the grounds asserted in the court below or in an effort to have the United States Supreme Court reverse it, when he himself has not sought review of the whole judgment, or that portion which he considers adverse to him. [42]

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[42] *Letulle v. Scofield* (1939), 308 US 415, 421, 422, 84 L Ed 355, 360, 361, 60 S Ct 313; *Helvering v. Pfeiffer* (1937), 302 US 247, 250, 251, 82 L Ed 231, 233, 234, 58 S Ct 159.

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be affirmed, and the petition for a writ of certiorari should be denied.

Dated: March ....., 1972.

Respectfully submitted,

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